MOHAMMAD PERVAIZ

From: MARGARET NOONAN
Sent: Thursday, February 28, 2019 8:38 AM
To: mgoodman@cwc.org
Cc: JUSTIN WEST
Subject: 2018 EEO-1 reports

Good morning Mr. Goodman,

Dr. Rashida Dorsey passed along your inquiry about the 2018 EEO-1. I am the team lead for the Employer Data Team (EDT), and the appropriate contact for questions about the EEO Surveys, including the EEO-1. I am glad to hear that you received news that the closing of the survey has been postponed until the end of May. You are also correct that the opening is delayed as well. We will be opening the survey the third week of March and will be announcing a firm date this week. The filing requirements for the 2018 EEO-1 are the same as the 2017 EEO-1 filing requirements.

I hope this answers your questions. Please let me know if you have any additional questions. I will be attending the CWC meeting next week, and I look forward to meeting you then.

Sincerely,
Margaret

Margaret Noonan
Statistician
U.S. Equal Employment Opportunity Commission
Office of Enterprise Data and Analytics
Employer Data Team, Lead
131 M Street NE
Washington, DC

MOHAMMAD PERVAIZ

From: David Fortney <dfortney@fortneyscott.com>
Sent: Tuesday, March 05, 2019 7:39 AM
To: VICTORIA A. LIPNIC
Subject: touch base

Vicki,
It was great to see you last week at the reception for Chai. Couple of quick items:

1. I want to be sure that you consider the invitation to speak at The Institute's annual meeting in Washington, DC on May 1. I'm going to travel to the ABA meeting in Buenos Aires later that week, and then spend a few days both before and after the ABA meeting on leave.
2. I assume that EEOC will issue a response to the ruling yesterday in *NWLC v. OMB* reinstating the EEO-1 part 2 comp data collection. Obviously, the question is whether the pending filings due by May 31, 2019 now must include the part 2 comp data.

Call if there is any way we can assist in what I know will be an incredibly busy time in responding to the ruling.

Best,
David

David S. Fortney

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MOHAMMAD PERVAIZ

From: Hartstein, Barry A. <BHartstein@littler.com>
Sent: Tuesday, March 05, 2019 2:24 PM
To: DONALD MCINTOSH
Cc: Paretti, Jim; VICTORIA A. LIPNIC
Subject: EEO-1

Donald- Is the the EEOC and Acting Chair Lipnic in any position to address the decision below reinstating the pay data requirement on the EEO-1's? The employer community will be at a complete loss in how to prepare the EEO-1's based on this decision, unless the comments on the EEOC website about using the old EEO-1 form remain in effect. See below.

> **….the Court VACATES** OMB's stay of the EEOC's revised EEO-1 form and the September 15, 2017 Federal Register Notice (Stay the Effectiveness of the EEO-1 Pay Data Collection, **82 Fed. Reg. 43362**) announcing the same.
>
> It is further **ORDERED** that the previous approval of the revised EEO-1 form shall be in effect.
>
> Date: March 4, 2019

-Barry

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, et al., Plaintiffs, v. OFFICE OF MANAGEMENT AND BUDGET, et al., Defendants.

Civil Action No. 17-cv-2458 (TSC)

March 4, 2019, Decided

For National Women's Law Center, Labor Council For Latin American Advancement, Plaintiffs: Javier M. Guzman, Jeffrey B. Dubner, LEAD ATTORNEYS, Robin Frances Thurston, DEMOCRACY FORWARD FOUNDATION, Washington, DC USA; Emily J. Martin, Maya Raghu, Sunu P. Chandy, NATIONAL WOMEN'S LAW CENTER, Washington, DC USA.

For Office of Management And Budget, John Michael Mulvaney, Director, Office of Management and Budget, Neomi Rao, Administrator, Office of Information and Regulatory Affairs, U.S. Equal Employment Opportunity Commission,

Victoria A. Lipnic, Acting Chair, U.S. Equal Employment Opportunity Commission, Defendants: Rachael Lynn Westmoreland, Tamra Tyree Moore, LEAD ATTORNEYS, U.S. DEPARTMENT OF JUSTICE, Washington, DC USA.

TANYA S. CHUTKAN, United States District Judge.

TANYA S. CHUTKAN

MEMORANDUM OPINION

Pending before the court are Defendants' Motion to Dismiss, ECF No. 11; Plaintiffs' Motion for Summary Judgment, ECF No. 22; and Defendants' Motion for Summary Judgment, ECF No. 27. Having reviewed the parties' filings, the record, and the relevant case law, the court, for reasons set forth below, hereby **DENIES** Defendants' Motion to Dismiss, **GRANTS** Plaintiffs' Motion for Summary Judgment, **DENIES** Defendants' Motion for Summary Judgment, and **VACATES** the Office of Management and Budget's stay of the Equal Employment Opportunity Commission's revised EEO-1 form and the September 15, 2017 Federal Register Notice (Stay the Effectiveness of the EEO-1 Pay Data Collection, **82 Fed. Reg. 43362**) announcing the same. It is further **ORDERED** that the previous approval of the revised EEO-1 form shall be in effect.

I. BACKGROUND

A. The Paperwork Reduction Act

The Paperwork Reduction Act of 1995, **44 U.S.C. § 3501** *et seq.* ("PRA"), was established to "minimize the paperwork burden" that the federal government may require "for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government." **44 U.S.C. § 3501(1)** . The statute also strives to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society." *Id.* **§ 3501(4)** .

In striking the balance between minimizing the burden on the public and obtaining useful information for the government, Congress established a procedure in which federal agencies must obtain approval from the Office of Management and Budget ("OMB") to collect certain types of information from the public. Under the PRA, an agency that proposes to collect information first conducts its own "evaluation of the need for the collection of information" and the burden collecting such information would create. *Id.* **§ 3506(c)(1)(A)** (i). Frequently, the agency is also required to publish a "sixty-day notice" in the Federal Register to solicit comments on the agency's proposal. *Id.* **§ 3506(c)(2)(A)** . After considering [*2] comments and making any revisions, the agency submits the proposed collection of information to OMB and publishes a second Federal Register notice. This notice announces the start of OMB's review and begins a 30-day comment period. *Id.* **§ 3507(a)** -**(b)** . "In [this] notice, the agency must set forth (1) a title for the collection of information, (2) a summary of the collection of information, (3) a brief description of the need for the information and the proposed use of the information, (4) a description of the likely respondents and proposed frequency of response to the collection of information, and (5) an estimate of the burden that shall result from the collection of information." *United to Protect Democracy v. Presidential Advisory Comm'n on Election Integrity*, **288 F. Supp. 3d 99** , **102**(D.D.C. 2017) (citing **44 U.S.C. § 3507(a)(1)(D)(ii)(I)** -**(V)**). OMB may not act on the agency's request until after the comment period has closed. **44 U.S.C. § 3507(b)** .

Upon completion of its review, OMB, through the Office of Information and Regulatory Affairs ("OIRA"), makes one of three determinations: it (1) approves the collection of information; (2) disapproves the collection of information; or (3) instructs the agency to make changes to the collection of information. *Id.* **§ 3507(c)(1)** , **(e)(1)** . Before approving a proposed collection, OMB must "determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility." *Id.* **§ 3508** . Once OMB grants approval, the agency may proceed with its collection, and OMB issues a control number that must be displayed on the collection-of-information form. *Id.* **§ 3507(a)(2)** , **(3)** . An OMB approval is for three years, after which the agency must seek an extension from OMB. *Id.* **§§ 3507(g)** , **(h)(1)** .

At any point before the approval period expires, OMB "may decide on its own initiative, after consultation with the agency, to review the collection of information." **5 C.F.R. § 1320.10(f)** . This review can be started only "when relevant circumstances have changed or the burden estimates provided by the agency at the time of initial submission were materially in error." ***Id*** . OMB may also stay the prior approval of a collection of information not contained in a current rule, but only for "good cause." *Id.* **§ 1320.10(g)** .

B. The EEO-1

Pursuant to Title VII of the Civil Rights Act of 1964, **42 U.S.C. § 2000e** *et seq.*, employers are required to "make and keep such records relevant to the determination[] of whether unlawful employment practices have been or are being committed, . . . preserve such records" and produce reports as mandated by EEOC. **42 U.S.C. § 2000e-8(c)(1) -(3)** . Since 1966, EEOC has required that employers with one hundred or more employees file with EEOC the "Employer Information Report EEO-1" ("EEO-1"). **29 C.F.R. § 1602.7** .[1] The EEO-1 requires employers to report the number of individuals employed by job category, sex, race, and ethnicity. Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, **81 Fed. Reg. 5113** (Feb. 1, 2016) ("Sixty-Day Notice"). EEOC makes aggregate EEO-1 information for major geographic areas and industry groups publicly available on an annual basis. Compl. ¶ 59.

C. Revision [*3] of EEO-1 - Component 2

In 2010, the EEOC "joined other federal agencies . . . to identify ways to improve enforcement of federal laws prohibiting pay discrimination." 81 Fed. Reg. at 5114. Subsequently, the EEOC "commissioned a study, and the NAS [National Academy of Sciences] convened a Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin." *Id.* NAS issued a report which "recognized the potential value for enforcement of collecting pay data from employers by sex, race, and national origin through a survey such as the EEO-1, and emphasized the importance of a definitive plan for how the data would be used in coordination with other equal employment opportunity (EEO) enforcement agencies." *Id.* NAS also "recommended that the EEOC conduct a pilot to inform the parameters for any pay data collection." *Id.* (footnote omitted). Following NAS's recommendation, "EEOC commissioned an independent Pilot Study to identify the most efficient means to collect pay data." *Id.* The Pilot Study "made technical recommendations about several central components of a data collection, including: The unit of pay to be collected; the best summary measures of central tendency and dispersion for rates of pay; appropriate statistical test(s) for analyzing pay data; and the most efficient and least costly methods for transmitting pay data from employers." *Id.* It "also estimated employer burden-hour costs and the processing costs associated with the recommended method of collection." *Id.*

In 2012, the EEOC held a two-day meeting with "employer representatives, statisticians, human resources information systems (HRIS) experts, and information technology specialists (work group)." Id. at 5114-15. This group "reviewed the current data collection procedures, provided feedback on future modernization of the EEO surveys, and engaged in brainstorming that led to ideas submitted individually by group participants on a number of topics, including collecting pay data as well as multiple-race category data on the EEO-1." Id. at 5115. The report from this group "reflect[ed] feedback from participants that the burden of reporting pay data would be minimal for EEO-1 filers." *Id.*

On February 1, 2016, following this interagency process, EEOC, in accordance with the PRA, published a Federal Register notice announcing its intention to seek a three-year approval from OMB of "a revised Employer Information Report (EEO-1) data collection." 81 Fed. Reg. at 5113. The notice explained that the "revised data collection has two components. Component 1 collects the same data that is gathered by the currently approved EEO-1: Specifically, data about employees' ethnicity, race, and sex, by job category. Component 2 collects data on employees' W-2 earnings and hours worked, which EEO-1 filers already maintain in the ordinary course of business." *Id.* EEOC proposed "collect[ing] aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories." Id. at 5117. The notice provided a weblink to a sample data collection form. Id. at 5118 ("An illustration of the data to be collected [*4] by both Components 1 and 2 can be found at [link].").[2] The notice also anticipated that employers would provide the information either through online filing or by uploading an electronic file. Id. at 5120. EEOC estimated that the new pay data collection would increase the reporting time per filer by 3.4 hours. Id. at 5119. On March 16, 2016, EEOC held a public hearing on its proposed pay data collection. Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), **81 Fed. Reg. 45479** , 45480 (July 14, 2016).

On July 14, 2016, EEOC published a second Federal Register notice ("Thirty-Day Notice") seeking a three-year approval from OMB of a revised EEO-1 data collection. **81 Fed. Reg. 45479** . This notice explained that EEOC had to revise the EEO-1 for the enforcement of equal pay laws. Id. at 45481-83. EEOC intended to maintain its earlier "proposal to collect W-2 income and hours-worked data in the twelve pay bands . . . for each of the 10 EEO-1 job categories." Id. at 45489. The filings of EEO-1 reports would be done "either by digital upload or by data entry onto a password-protected, partially pre-populated digital EEO-1." Id. at 45493. For those employers who filed through data uploads, EEOC would post online the new data file specifications "for Components 1 and 2 of the modified EEO-1 as soon as OMB approve[d] the information collection." Id. at 45487. EEOC further explained that "[t]he EEO-1 data file specifications will be for data uploads (submitting EEO-1 data in one digital file), but they also will describe the formatting of data for direct data entry onto the firm's secure EEO-1 account with the Joint Reporting Committee." *Id.* "For reference," EEOC provided a link to a website with the then-current EEO-1 data file specifications. *Id.* EEOC estimated that the addition of Component 2 would increase the filing cost for each EEO-1 filed by $416.58. Id. at 45493-94. The collection of pay data would begin with the 2017 reporting cycle, and EEO-1 respondents would be required to submit their reports by March 31, 2018. Id. at 45484. On September 28, 2016, EEOC provided its Final Supporting Statement for the EEO-1 report to OMB for review. Link Decl. ¶ 12, Ex. I. OMB approved the proposed collection on September 29, 2016 and issued an OMB control number for the revised EEO-1.*Id.* ¶ 11, Ex. H.

EEOC subsequently released an instruction booklet for the March 2018 EEO-1 survey, along with information about the revised EEO-1, including data file specifications for employers who planned to file through data upload. *Id.* ¶¶ 5, 6. The data file specifications included a sample EEO-1 form for pay data collection and a "data file layout" form. *Id.* ¶ 5. The data file layout form was a spreadsheet with instructions for formatting pay data submissions to EEOC.*Id.* ¶ 7, Ex. D.

D. OMB's Decision to Review and Stay Component 2

Just under a year after OMB approved the data collection, on August 29, 2017, Neomi Rao, the OIRA Administrator, sent a memorandum to Victoria Lipnic, the Acting Chair of the EEOC, stating that OMB had decided to initiate a review and stay of EEOC's new collection of pay data under Component[*5] 2. In support of this decision, the memorandum stated in pertinent part:

The PRA authorizes the Director of OMB to determine the length of approvals of collections of information and to determine whether collections of information initially meet and continue to meet the standards of the PRA. In this context, under **5 CFR 1320.10(f)** and **(g)** , OMB may review an approved collection of information if OMB determines that the relevant circumstances related to the collection have changed and/or that the burden estimates provided by EEOC at the time of initial submission were materially in error. OMB has determined that each of these conditions for review has been met. For example, since approving the revised EEO-1 form on September 29, 2016, OMB understands that EEOC has released data file specifications for employers to use in submitting EEO-1 data. These specifications were not contained in the Federal Register notices as part of the public comment process nor were they outlined in the supporting statement for the collection of information. As a result, the public did not receive an opportunity to provide comment on the method of data submission to EEOC. In addition, EEOC's burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate.
OMB has also decided to stay immediately the effectiveness of the revised aspects of the EEO-1 form for good cause, as we believe that continued collection of this information is contrary to the standards of the PRA. Among other things, OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.
Memorandum from Neomi Rao, Adm'r, OIRA, to Victoria Lipnic, Acting Chair, EEOC (Aug. 29, 2017); JA020, ECF No. 44 ("Rao Memorandum").

The memorandum further directed EEOC to publish a notice in the Federal Register "announcing the immediate stay of effectiveness of the" pay data collection but "confirming that businesses may use the previously approved EEO-1 form in order to comply with their report obligations for FY 2017." *Id.*EEOC published this notice on September 15, 2017. Stay the Effectiveness of the EEO-1 Pay Data Collection, **82 Fed. Reg. 43362** (Sept. 15, 2017).

This stay remains in effect nearly a year and a half later.

E. Plaintiffs' Lawsuit

Plaintiff National Women's Law Center ("NWLC") is "a 46-year-old nonpartisan, nonprofit organization that advocates for the rights of women and girls at school, at work, at home, and in their communities." Johnson Decl. ¶ 3. "[C]losing the gender wage gap, and in particular the race and gender wage gaps experienced by women of color," is "[o]ne of NWLC's primary and longstanding priorities." *Id.* ¶ 4. As part of its mission, NWLC strives to "educate employers, the public, and policymakers about race and gender wage gaps," *id.* ¶ 5, and "has published numerous analyses and reports about workplace pay disparities." *Id.* Many of these reports "cite data on pay inequality across a number of factors and reflect time-consuming [*6] analysis of Bureau of Labor Statistics and Census data undertaken by NWLC staff." *Id.*

Plaintiff Labor Council for Latin American Advancement ("LCLAA") is "a national 501(c)(3) representing the interests of approximately 2 million Latino/a trade unionists throughout the United States and Puerto Rico, as well as other non-unionized Latino workers," and "has 52 chapters around the country." Sanchez Decl. ¶ 3. LCLAA's "mission is to assist workers to advance their rights in their workplace and convince employers to take steps to improve working conditions, both through advocacy and through training and counseling workers and union members." *Id.* ¶ 4. Recently, "[c]losing the pay gap has been an increasing focus of LCLAA's work." *Id.* ¶ 5. For example, in 2012 "LCLAA created the Trabajadoras Initiative which specifically seeks to protect and advance the interests of Latina workers on issues that impact them, including seeking to eradicate the persistent pay gap." *Id.* ¶ 6. LCLAA's activities include educating its members, chapter presidents, and the public about the pay gap. *Id.* ¶¶ 7, 8. Starting in 2016, LCLAA has "host[ed] an annual National Latina Equal Pay Summit, which provides information, education and solutions to closing the pay gap." *Id.* ¶ 8. Moreover, as part of its education efforts, "LCLAA periodically issues reports . . . about the challenges encountered by Latinos and Latinas in the workforce. The reports discuss data compiled and published by the Government on income and employment—including EEO-I data. LCLAA uses these reports in advocating for policy change and enforcement of equal pay laws, and in educating its members on ways to negotiate with employers and encourage them to follow practices that reduce workforce discrimination." *Id.* ¶ 9.

On November 15, 2017, two months after the Rao Memorandum and the subsequent notice in the Federal Register staying the effectiveness of the EEO-1 pay data collection, Plaintiffs sued, naming as defendants: OMB; John Michael Mulvaney, Director of OMB; Neomi Rao, Administrator of OIRA; EEOC; and Victoria A. Lipnic, Acting Chair of EEOC. Plaintiffs ask this court to: 1) declare that OMB Defendants violated the PRA and Administrative Procedure Act ("APA") and exceeded their statutory authority in reviewing and staying the collection of pay data as part of the EEO-1; 2) declare that the stay announced in the Rao Memorandum and the September 15, 2017 Federal Register notice was a nullity, and that the revised EEO-1 remains in effect; 3) vacate the stay and reinstate the revised EEO-1 reporting requirements; 4) order EEOC Defendants to publish a Federal Register notice announcing this reinstatement or take equivalent action necessary to immediately reinstate the pay data collection; 5) award Plaintiffs their costs, reasonable attorneys' fees, and other disbursements incurred in this action; and 6) grant such other relief as the court may deem just and proper. Compl. at 34-35.

NWLC claims, among other injuries, that if OMB had not stayed the pay data collection NWLC "would have been able to make its reports and advocacy more robust [*7] with additional data and analysis." Johnson Decl. ¶ 6. Possession of the aggregate EEO-1 pay data would allow NWLC to "focus its resources, analysis, and advocacy on the jobs, industries, and regions where intervention is most urgent." *Id.* ¶ 7. LCLAA similarly claims injury from OMB's decision to stay the pay data collection. With the information that otherwise would have been collected, LCLAA would "have presented statistics on pay equity within industries and across the nation, based on this data. This information would have materially improved LCLAA's and its members' ability to negotiate with and educate employers and to fulfill LCLAA's mission of improving the condition of Latinos and Latinas in the workforce." Sanchez Decl. ¶ 11.

Defendants have moved to dismiss pursuant to **Federal Rule of Civil Procedure 12(b)(1)** , on the grounds that Plaintiffs lack standing, and pursuant to**Federal Rule of Civil Procedure 12(b)(6)** , because Plaintiffs have not challenged a final agency action. Both sides have moved for summary judgment.

II. MOTION TO DISMISS

A. Legal Standard

A motion pursuant to **Federal Rule of Civil Procedure 12(b)(1)** "presents a threshold challenge to the court's jurisdiction." *Haase v. Sessions*, **835 F.2d 902** , **906** (D.C. Cir. 1987). "[T]he core component of standing is an essential

and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, **504 U.S. 555** , **560** (1992). The plaintiff bears the burden of establishing the elements of standing, **id. at 561** , and each element "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Arpaio v. Obama*, **797 F.3d 11** , **19** (D.C. Cir. 2015) (quoting *Lujan*, **504 U.S. at 561**). The plaintiff must "show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury." *Sierra Club v. EPA*, **292 F.3d 895** , **899** (D.C. Cir. 2002) (citation omitted). With respect to a facial 12(b)(1) motion to dismiss, the court must "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio*, **797 F.3d at 19** . At the summary judgment stage, the plaintiff "must support each element of its claim to standing by affidavit or other evidence." *Scenic Am., Inc. v. U.S. Dep't of Transp.*,**836 F.3d 42** , **48** n.2 (D.C. Cir. 2016) (quotation marks and citation omitted).

"To survive a motion to dismiss" under **Federal Rule of Civil Procedure 12(b)(6)** , "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, **556 U.S. 662** , **678** (2009) (quotation marks and citation omitted). However, a court "is not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, **550 U.S. 544** , **555** (2007) (quotation marks and citation omitted).

B. Informational and Organizational Standing

Because Plaintiffs are two organizations seeking to sue on their own behalf, i.e., seeking organizational standing, "like an individual plaintiff" they must show "[1] actual or threatened injury in fact [2] that is fairly traceable to the alleged illegal action and [3] likely to be redressed by a favorable court decision." *People for the Ethical Treatment of Animals v. USDA* ("*PETA*"), **797 F.3d 1087** , **1093** (D.C. Cir. 2015) (quotation marks and [*8] citation omitted).

1. Informational Standing

Although both plaintiffs base their claim of injury on the loss of information that Component 2 would have provided, both nevertheless lack so-called "informational standing." The D.C. Circuit has been clear that to demonstrate informational standing, a plaintiff must show that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, **828 F.3d 989** , **992** (D.C. Cir. 2016) (citation omitted). It is undisputed that Plaintiffs here do not have a statutory right to the information they allege forms their injury in fact. Therefore, any claim to informational standing "fails at the first part of the inquiry, the *sine qua non* of informational injury." ***Id*** .

2. Organizational Standing

Whether Plaintiffs' loss of information can also serve as an injury in fact as a component of organizational standing, however, presents a more complicated question. While the D.C. Circuit has provided some conflicting guidance, this court concludes that under binding precedent, in particular *PETA* and *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, **789 F.2d 931** (D.C. Cir. 1986), Plaintiffs have demonstrated organizational standing.

The Supreme Court has said that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both concrete *and* particularized." *Spokeo, Inc. v. Robins*, **136 S. Ct. 1540** , **1545** (2016) (quotation marks and citation omitted) (emphasis in original). "A particularized injury is personal, individual, distinct, and differentiated—not generalized or undifferentiated. An actual or imminent injury is certainly impending and immediate—not remote, speculative, conjectural, or hypothetical." *Food & Water Watch, Inc. v. Vilsack*, **808 F.3d 905** , **914** (D.C. Cir. 2015) (quotation marks and citation omitted). Plaintiffs must show that they have "suffered a concrete and demonstrable injury to [their] activities." **Id. at 919** (quotation marks and citation omitted).

In order to determine whether an organization has suffered an injury in fact, courts conduct a "two-part inquiry—we ask, first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." ***Id*** . (quotation marks and citation omitted) (alteration in original).

In *Action Alliance*, plaintiffs were "four organizations that endeavor[ed], through informational, counseling, referral, and other services, to improve the lives of elderly citizens." **789 F.2d at 935** . They sued the Department of Health and Human Services ("HHS"), alleging that HHS's regulation "significantly restrict[ed]" the flow of "information regarding services available to the elderly" that, if possessed by plaintiffs, "would enhance [their] capacity . . . to refer members to appropriate services and to counsel members when unlawful age discrimination may have figured in a benefit denial." **Id. at 937** . The D.C. Circuit found that the [*9] plaintiffs established standing, because the regulations kept plaintiffs from "access to information and avenues of redress they wish[ed] to use in their routine information-dispensing, counseling, and referral activities. Unlike the mere 'interest in a problem' or ideological injury in *Sierra Club* [*v. Morton*, **405 U.S. 727** , **735** , 739 (1972)]," plaintiffs had "alleged inhibition of their daily operations, an injury both concrete and specific to the work in which they [were] engaged." *Action Alliance*, **789 F.2d at 937-38** (quotation marks omitted) (footnote omitted).

In *PETA*, plaintiff, an animal rights organization, sued the USDA and requested that the court order USDA to "extend enforcement of the AWA [Animal Welfare Act] to birds covered by the AWA, by enforcing the general AWA standards that presently exist." **797 F.3d at 1091** (quotation marks omitted) (footnote omitted). PETA claimed that USDA's failure to investigate allegations of bird mistreatment denied the public reports of those alleged instances, and that it used the information in the reports to educate its members and the public. **Id. at 1095-96** . The district court found that PETA had standing because USDA's decision not to apply the AWA to birds "precluded PETA from preventing cruelty to and inhumane treatment of these animals through its normal process of submitting USDA complaints and it deprived PETA of key information that it relies on to educate the public." **Id. at 1094** (quotation marks and citation omitted). The D.C. Circuit affirmed, noting that "[t]he key issue is whether PETA has suffered a concrete and demonstrable injury to [its] activities, mindful that, under our precedent, a mere setback to [PETA's] abstract social interests is not sufficient." **Id. at 1093** (second alteration in original) (quotation marks and citations omitted). The Court explained that in determining "whether an organization's injury is concrete and demonstrable," a court asks "first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." **Id. at 1094** (alteration in original) (quotation marks and citations omitted). Applying these standards, the Court found that PETA's alleged injuries were "materially indistinguishable from those alleged by the organizations in *Action Alliance*." **Id. at 1094** . It held that the "USDA's allegedly unlawful failure to apply the AWA's general animal welfare regulations to birds has perceptibly impaired PETA's ability to both bring AWA violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public." Id. at 1095 (quotation marks and brackets omitted). Because PETA expended resources to counters its injuries, it established organization standing. *Id.* Significantly, plaintiffs did not allege a statutory right to the information. *See* id. at 1103 (Millett, J., concurring dubitante) ("Even as alleged by PETA, there is no suggestion that anything in the Animal Welfare Act or any regulation gives PETA any legal *right* to such information or reports.") (emphasis in original).

Under *Action* [*10] *Alliance* and *PETA*, Plaintiffs have demonstrated an injury in fact. First, they have shown that the loss of pay data caused a "concrete and demonstrable injury" that is "more than simply a setback to [their] abstract social interests." *Havens Realty Corp. v. Coleman*, **455 U.S. 363** , **379**(1982). As part of its mission to eradicate the gender wage gap, NWLC seeks to educate the public by publishing analyses and reports about workplace pay disparities. Johnson Decl. ¶ 4. When NWLC became aware that EEOC was planning to publish the pay data based on the revised EEO-1, it determined that this data could have revealed new information about the race and gender gaps. *Id.* ¶ 6. This information would have made NWLC's reports and advocacy more robust because they would have additional data and analysis. *Id.* The aggregate EEO-1 pay data would have enabled NWLC to focus its efforts where intervention was most urgent. *Id.* ¶ 7. With respect to NWLC's efforts to enforce and redress workplace discrimination, NWLC's pro bono representation would have benefited from the EEO-1 pay data collection. *Id.* ¶ 8. With the aggregate pay data, NWLC would more easily have been able to evaluate clients' claims. *Id.* ¶ 9. When representing their clients before the EEOC and in courts, the NWLC "bear[s] the costs of amassing evidence about internal pay inequities and comparators' pay practices to obtain redress." *Id.* ¶ 10. This evidence, the NWLC represents, may help persuade EEOC to act or prove claims to a court or jury. *Id.* Finally, the aggregate employee pay data would reduce NWLC's costs when representing clients "in the EEOC charge process and beyond." *Id.* ¶ 11.

Similarly, as part of its advocacy and educational work, Plaintiff LCLAA issues reports "about the challenges encountered by Latinos and Latinas in the workforce." Sanchez Decl. ¶ 9. LCLAA would have used the EEO-1 aggregate pay data to present "statistics on pay equity within industries and across the nation, based on this data. This information would have

materially improved LCLAA's and its members' ability to negotiate with and educate employers and to fulfill LCLAAs mission of improving the condition of Latinos and Latinas in the workforce." *Id.* ¶ 11.

Plaintiffs' declarations establish that NWLC and LCLAA would have used the EEOC pay data to advance their missions by using the data in their publications and as part of their public education and advocacy campaigns. The loss of the pay data constitutes the type of informational harm the D.C. Circuit has found to be "both concrete and specific to the work in which [these organizations] are engaged." *PETA*, **797 F.3d at 1095** (quotation marks and citation omitted); *see* **id. at 1094** (stating that the government "deprived PETA of key information that it relies on to educate the public") (quotation marks and citation omitted); *Action Alliance*, **789 F.2d at 937-38** (noting that "the challenged regulations denied plaintiffs access to information and avenues of redress they wish to use in their routine information-dispending, counseling, and referral activities").

Second, Plaintiffs have shown that they have used their resources to "counteract [the] harm" caused [*11] by the stay of the data collection. *Food & Water Watch, Inc.*, **808 F.3d at 919** (citation omitted). After OMB stayed the data collection, NWLC "expended funding and staff time that would have been unnecessary absent the stay." Johnson Decl. ¶ 12. These additional expenditures included "time to engage with employers to encourage voluntary compliance with equal pay laws and changes in compensation practices and policies" and "voluntary self-audits of pay practices and internal wage gaps, in order to compensate for the self-evaluation of internal wage gaps that the EEO-1 pay data collection would have required employers to undertake." *Id.* ¶ 12. Moreover, "in order to meet the objective of improved enforcement of pay discrimination law and increased self-evaluation by employers of their own practices, NWLC has expended and will expend funding and staff time" on tasks that it is "compelled" to take in pursuit of "its mission of eradicating the pay gap." *Id.* ¶¶ 13, 14. These tasks require NWLC staff to "create model state and/or local pay data collection legislation; create educational materials setting out the need for such pay data collection and the interests it serves; build coalition and grassroots support in targets states and/or localities for these measures; and advocate at the state and local level for adoption and implementation of such legislation." *Id.* ¶ 13. These and similar endeavors have forced NWLC staff members to divert time from their daily operations. *Id.* ¶ 15.

LCLAA states that "[t]o replicate the same information LCLAA would obtain from the revised EEO-l, LCLAA would have to convince thousands of employers to voluntarily provide data and then employ statisticians to analyze the resulting raw data—efforts that would require enormous expense and *still*likely be unsuccessful, given LCLAA's inability to require employers to comply." Sanchez Decl. ¶ 12 (emphasis in original). LCLAA further represents that "any attempt to compile such data would almost certainly underreport pay inequities, because employers with significant disparities would be particularly unlikely to provide data voluntarily." *Id.* Because of the stay, LCLAA is considering whether to use a "very costly" survey of workers to obtain the information it otherwise would have had. *Id.* ¶ 13. The stay also "forced LCLAA to redeploy its limited staff resources away from their daily operations." *Id.* ¶ 14. For example, LCLAA had planned to have staff work on educational materials related to the North American Free Trade Agreement and its impact for Latino/a workers—an initiative that "is a core and common part of LCLAA's daily operations"—but it could not do so because it had to redeploy its resources to working on obtaining the information that it likely would have received but for OMB's decision to stay the data collection. *Id.* ¶ 16.

The court must next determine whether Defendants caused Plaintiffs' injuries and whether they can be redressed by a favorable court decision. To establish causation, Plaintiffs must show "a causal connection between the injury and the conduct complained of— [*12] the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, **504 U.S. 555** , **560** (1992) (quotation marks and citation omitted) (alterations in original). "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *West v. Lynch*, **845 F.3d 1228** , **1235** (D.C. Cir. 2017) (quoting *Fla. Audubon Soc'y v. Bentsen*, **94 F.3d 658** , **663-64** (D.C. Cir. 1996) (en banc) (footnote omitted)). Standing is "substantially more difficult to establish," because Plaintiffs are not the object of the government action. *Lujan*, **504 U.S. at 562** (quotation marks and citation omitted). "If the challenged conduct is at best an indirect or contributing cause of the plaintiff's injury—*i.e.*, if the injury may or may not follow from the conduct, based on a chain of contingencies—the plaintiff faces an uphill climb in pleading and proving redressability." *West*, **845 F.3d at 1235-36** (quotation marks and citation omitted). Thus, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, **504 U.S. at 561** (quotation marks and citations omitted).

The government does not challenge the proposition that, but for OMB's stay of the data collection, EEOC would have collected the Component 2 pay data. Therefore, the key issue with respect to causation and redressability is whether Plaintiffs have shown that EEOC likely would have published the aggregate pay data collected from Component 2.

EEOC has discretion whether to publicly report the Component 2 pay data. Therefore, this court pays particular attention to EEOC's statements about its intention to publicly publish this information. In its Thirty-Day Notice, EEOC said: "Using aggregated EEO-1 data, Census data, and potentially other data sources, the EEOC *expects* to periodically publish reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA)." 81 Fed. Reg. at 45491 (emphasis added).

Based on EEOC's statement that it "expects to periodically publish reports" based on the aggregated EEO-1 date—a declaration that EEOC has never repudiated—the court finds that EEOC likely would have published the information and made it available to the Plaintiffs. Moreover, EEOC explained how publishing the information would be useful: "Particularly after a few years of data collection, these reports will provide useful comparative data. For smaller employers and others that do not hire consultants to analyze their compensation structures, these reports will be especially informative in light of the business case for equal pay and the need to comply with state equal pay laws." 81 Fed. Reg. at 45491. The court has no reason not to take the government at its word. *Cf. Wheaton Coll. v. Sebelius*, **703 F.3d 551** , **552** (D.C. Cir. 2012) ("We take the government at its word and will hold it to it.").[3]Therefore, the court finds that Plaintiffs have demonstrated causation and redressability.

There is some uncertainty about whether an informational injury **[*13]** can exist in the absence of a statutory or regulatory right to the information. Judge Millett expressed this doubt in *PETA*, even as she recognized that "the majority opinion hew[ed] faithfully to precedential lines" in finding standing where the plaintiffs lacked any statutory or regulatory right to the information. *PETA*, **797 F.3d at 1099** (Millett, J., concurring dubitante). In Judge Millett's view, finding injury in fact where plaintiffs seek information unconnected to the exercise of a right conferred by statute is "tantamount to recognizing a justiciable interest in the enforcement of the law." **Id. at 1106** (quotations marks and citation omitted); *see also Food & Water Watch, Inc.*, **808 F.3d at 926** (D.C. Cir. 2015) (Millett J., concurring) ("Because the majority opinion properly applies our precedent to keep a bad jurisprudential situation from getting worse, I concur. But I continue to believe that our organizational standing doctrine should be revisited in an appropriate case.").

In a difference concurrence, Judge Williams questioned whether informational injury and organizational injury should be viewed as separate categories: "[O]rganizational standing is merely the label assigned to the *capacity* in which the organization contends it has been harmed; it is not a separate *type* of injury." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, **878 F.3d 371** , **381** (D.C. Cir. 2017) (Williams, J., concurring) (emphasis in original) ("*EPIC*").

Other cases have indicated that the Court intends for informational and organizational standing to continue to be viewed as distinct categories. *See Friends of Animals v. Jewell*, **828 F.3d 989** , **994** (D.C. Cir. 2016) (criticizing the Sixth Circuit for conflating informational and organizational standing). Some, however, point in a different direction. *See EPIC*, **878 F.3d at 377** ("We conclude that EPIC lacks standing to obtain such relief because it has suffered no cognizable informational or organizational injury. We analyze and reject those two asserted types of injury in turn without necessarily agreeing that they are in fact analytically separate here."). Nonetheless, *Action Alliance* and *PETA* have not been overruled and remain binding on this court.

The government advances numerous arguments why Plaintiffs have not established organizational standing. All are unavailing. First, the government argues that the D.C. Circuit's decision in *EPIC* means that if an organization lacks informational standing it must also lack organizational standing. But *EPIC* could not and does not purport to overrule *Action Alliance* and *PETA*. *See General Comm. of Adjustment, GO-386 v. Burlington Northern & Santa Fe Ry. Co.*, **295 F.3d 1337** , **1340** (D.C. Cir. 2002) (explaining that Circuit precedent "binds us, unless and until overturned by the court en banc or by Higher Authority") (quotation marks and citation omitted). Moreover, as indicated above, *EPIC* did not hold that informational and organizational standing are the same thing. *EPIC*, **878 F.3d at 377** . *EPIC* did not make a statutory right to withheld information a necessary condition for both informational *and*organizational standing. Moreover, its analysis in rejecting standing **[*14]** was more nuanced than the government suggests.

In *EPIC*, plaintiff was "a nonprofit organization whose stated mission [was] to focus public attention on emerging privacy and civil liberties issues." **Id. at 374** (quotation marks omitted). EPIC sought an injunction under the APA requiring the Presidential Advisory Commission on Election Integrity to undertake privacy assessment review pursuant to the E-Government Act of 2002 before collecting voter data information. ***Id*** . EPIC based its claims of both information and organizational standing on the lack of access to these privacy assessments. **Id. at 377** . The D.C. Circuit found that EPIC lacked informational standing because the statute was designed to protect individuals' privacy rights, and therefore EPIC as an organization had no cognizable interest in the privacy assessment reviews. **Id. at 378** ("As we read it, the provision is intended to protect *individuals*—in the present context, voters—by requiring an agency to fully consider their privacy before collecting their personal information. EPIC is not a voter and is therefore not the type of plaintiff the Congress had in mind.") (emphasis in original). The D.C. Circuit then found a lack of organizational injury because without a cognizable interest in the information, EPIC could not show that its efforts to obtain the information were not entirely discretionary budgetary choices. **Id. at 378-79** .

In contrast, this court has already found that both NWLC and LCLAA expended resources because of the government's refusal to collect and disseminate the Component 2 information. And, unlike in *EPIC*, Plaintiffs have sought information that is designed to protect far more than individuals' privacy rights.

The government further argues that *PETA* is inapplicable based on the Court's decision in *Food & Water Watch, Inc*. Defs.' Reply in Supp. of Mot. to Dismiss at 5, ECF No. 18. However, in that case, the D.C. Circuit described *PETA* as "instructive" in explaining why plaintiffs lacked standing. **808 F.3d at 920** . The plaintiffs in *Food & Water Watch, Inc.* challenged a new USDA regulation, claiming that it would lead to an increase in foodborne illness from contaminated poultry—a claim that the D.C. Circuit found to be unsubstantiated. The organizational plaintiff also claimed standing because it would have to spend resources educating the public about the fact that the new regulations did not sufficiently protect the public from unsafe poultry. ***Id*** . In *PETA*, the D.C. Circuit explained, because USDA did not apply animal welfare requirements to birds, it did not generate inspection reports. ***Id*** . This "denial of information perceptibly impaired" PETA's ability to bring statutory violations to USDA's attention and to continue to educate the public. **Id. at 920-21**(quotation mark and citation omitted). In contrast, the organizational plaintiff in *Food & Water Watch, Inc*. could not "allege that the USDA's action restricts the flow of information that FWW uses to educate its members." **Id. at 921** . Thus, *Food & Water Watch, Inc*. does not advance the government's argument here, because **[*15]** as in *PETA*, Plaintiffs NWLC and LCLAA have shown that the stay of EEOC's data collection deprives them of information that they use to educate their members and the public.

The government further contends that it could not have caused Plaintiffs to incur costs "because the EEOC has never before collected Component 2 pay data, let alone provided aggregate pay data to the public." Defs.' Mot. to Dismiss at 16, ECF No. 11. Therefore, the government argues, "OMB's decision to initiate a review and stay of the same before covered employers ever submitted such data simply maintains the status quo." *Id.* Here, Defendants misunderstand the law. "[T]he baseline for measuring the impact of a change or rescission of a final rule is the requirements of the rule itself, not the world as it would have been had the rule never been promulgated." *Air All. Hous. v. EPA*, **906 F.3d 1049** , **1068** (D.C. Cir. 2018). The government's argument is also inconsistent with both *PETA* and *Action Alliance*, where the Court of Appeals found injury in fact even though plaintiffs claimed an entitlement to information to which they previously did not have access. *See PETA*, **797 F.3d at 1089** ("Although the Agency has taken steps to craft avian-specific animal welfare regulations, it has yet to complete its task after more than ten years and, during the intervening time, it has allegedly not applied the Act's general animal welfare regulations to birds."); *Action Alliance*, **789 F.2d at 937** (plaintiffs challenging a new Department of Health and Human Services regulation).

The government advances a new standing argument in its Motion for Summary Judgment, asserting that "Plaintiffs lack standing to challenge a decision rendered in the context of an informal adjudication to which they are not a party." Defs.' Opp. to Pls.' Mot. for Summ. J. and Mot. for Summ. J. at 16, ECF No. 27-1 (citation omitted).

An adjudication is "retroactive, determining whether a party violated legal policy . . . [while] rulemaking . . . is of only future effect." *Ameren Servs. Co. v. Fed. Energy Regulatory Comm'n*, **880 F.3d 571** , **584** (D.C. Cir. 2018); *see also Catholic Health Initiatives Iowa Corp. v. Sebelius*, **718 F.3d 914** , **922**(D.C. Cir. 2013) ("[A]n adjudication *must* have retroactive effect, or else it would be considered a rulemaking.") (emphasis in original). The Rao Memorandum relieves covered employers from their obligations to provide Component 2 pay data in the future, and EEOC's notice in the

Federal Register does the same. The government provides the court with no precedent holding that an OMB determination under the PRA is considered an adjudication, and this court will not set a new course.[4]

In light of the foregoing, this court finds that Plaintiffs have met their burden to demonstrate organizational standing.[5]

C. Final Agency Action

The government moves to dismiss pursuant to **Rule 12(b)(6)** , arguing that OMB's decision to reconsider and stay EEOC's collection of pay data is not a final agency action and thus not subject to judicial review. The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." **5 U.S.C. §704** . "To be 'final,' agency action must 'mark the consummation of the agency's decisionmaking process' and 'be one [*16]by which rights or obligations have been determined, or from which legal consequences will flow.'" *Clean Air Council v. Pruitt*, **862 F.3d 1** , **6** (D.C. Cir. 2017) (quoting *Bennett v. Spear*, **520 U.S. 154** , **177-78** (1997)). "Case law interpreting this standard is 'hardly crisp,' and it 'lacks many self-implementing, bright-line rules, given the pragmatic and flexible nature of the inquiry as a whole.'" *Friedman v. Fed. Aviation Admin.*, **841 F.3d 537** , **541** (D.C. Cir. 2016) (quoting *Rhea Lana, Inc. v. Dep't of Labor*, **824 F.3d 1023** , **1027** (D.C. Cir. 2016)).

In *Clean Air Council*, "a group of environmental organizations, challenge[d] the Environmental Protection Agency's decision to stay implementation of portions of a final rule concerning methane and other greenhouse gas emissions." **862 F.3d at 4** . The government argued that the EPA's decision to stay the rule was not reviewable because it was not a final agency action. The D.C. Circuit followed the familiar two-pronged *Bennett* analysis and held that the court had jurisdiction. **Id. at 6-7** . It found that the EPA's stay satisfied the first prong - that the agency action "mark[s] the consummation of the agency's decisionmaking process," *Bennett*, **520 U.S. at 177-78** (quotation marks and citation omitted) - because it "suspended the rule's compliance deadlines," which, "[was] essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule." *Clean Air Council*, **862 F.3d at 6** . As the court explained, "By itself, EPA's decision to grant reconsideration, which merely begins a process that could culminate in no change to the rule, fails this [finality] test. The imposition of the stay, however, is an entirely different matter." **Id. at 6** .

The Court also found that EPA's stay affected the rights or obligations of the regulated parties. **Id. at 7** . (quotation marks omitted). The court explained:

Absent the stay, regulated entities would have had to complete their initial monitoring surveys by June 3 and repair any leaks within thirty days. Failure to comply with these requirements could have subjected oil and gas companies to civil penalties, citizens' suits, fines, and imprisonment. The stay—which EPA made retroactive to one day *before* the June 3 compliance deadline—eliminates that threat, and thus relieves regulated parties of liability they would otherwise face. ***Id*** . (citations omitted) (emphasis in original).

Just as in *Clean Air Council*, OMB's decision to reconsider and stay EEOC's collection of Component 2 pay data "mark[ed] the consummation of the agency's decisionmaking process." *Clean Air Council*, **862 F.3d at 6** (quotation marks and citation omitted). OMB—like EPA—did not choose solely to reconsider or review the previously approved collection of information; rather, it chose to review *and* stay it, thereby revoking its earlier approval of the Component 2 information collection. OMB's stay is not interlocutory simply because OMB will conduct future administrative proceedings to decide whether to approve EEOC's Component 2 data collection. "[T]he applicable test is not whether there are further administrative proceedings available, but rather whether the impact of the order is sufficiently final to warrant review [*17] in the context of the particular case." **Id. at 7** (quoting *Friedman v. FAA*,**841 F.3d 537** , **542** (D.C. Cir. 2016).

Moreover, OMB did not have to "review" *and* "stay" the data collection. The regulation's terms establish that these are separate decisions. OMB may "review" a data collection "when relevant circumstances have changed or the burden estimates . . . were materially in error." **5 C.F.R. § 1320.10(f)** . OMB may "stay" a data collection only for "good cause." *Id.* **§ 1320.10(g)** . OMB concedes that it made two decisions by acknowledging that it had "*also* decided to stay immediately the effectiveness of revised aspects of the EEO-1 form." Rao Memorandum at 2 (emphasis added).

OMB's stay also satisfies the second step of the *Bennett* test. Before the stay, covered employers were legally obligated to submit the Component 2 pay data to the EEOC by March 31, 2018, and were required to file the EEO-1, **29 C.F.R. § 1602.7** ; **41 C.F.R. § 60-1.7(a)(1)** , and false reporting subjected them to fines or imprisonment, **29 C.F.R. § 1602.8** . Covered employers could be compelled by court order to file their EEO-1 if they failed or refused to do so. *Id.***§ 1602.9** . The stay eliminated the pay data from this mandatory requirement, therefore creating legal consequences for the regulated entities, no matter whether OMB ultimately decides to approve or disapprove the pay data. *See Clean Air Council*, **862 F.3d at 7** ("Failure to comply with these requirements could have subjected oil and gas companies to civil penalties, citizens' suits, fines, and imprisonment. The stay . . . eliminates that threat, and thus relieves regulated parties of liability they would otherwise face.") (citations omitted).

The government nevertheless contends that because the stay does not directly affect the Plaintiffs' rights or obligations it fails the second prong of the finality test because Plaintiffs do not have any legal right to the pay data EEOC would have collected. Defs.' Mot. to Dismiss at 26-27, ECF No. 11. This argument fails because the correct test asks whether the stay has legal consequences, not whether it affects the plaintiffs' legal obligations. In *Clean Air Council*, the D.C. Circuit found that an environmental organization had standing where the stay affected the obligations of the regulated industries - oil and gas - not the environmentalists. **862 F.3d at 4** ; *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, **417 F.3d 1272** , **1281** (D.C. Cir. 2005) ("Because the Corps' [policies] mark the completion of the Corps' decision-making process and affect the [regulated entities'] day-to-day operations, they constitute final agency action regardless of the fact that the Corps' action might carry different (or no) consequences for a different challenger, such as an environmental group."). The government relies on *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, **76 F.3d 1212** (D.C. Cir. 1996), but in that case the agency's actions did not have *any* legal consequence. **Id. at 1215** ("[This] is not a case in which legal consequences will flow from the agency action taken thus far.") (quotation marks and citation omitted).

Defendants argue that *Clean Air Council* is inapposite. They point out that *Clean Air Council* involved the stay of a rule promulgated pursuant to notice and comment, the PRA permits the review and stay **[*18]** of the collection of information not contained in a rule, and permits only review but not the stay of information contained in a rule, and OMB's stay of Component 2 data is a stay of a collection of information not contained in a rule. While each of these points is correct, the Defendants cannot weave them together in a way that demonstrates why the stay in this case is not final.

First, OMB discusses the legislative history of the PRA with respect to the decision to permit stays of some collections of information but not others, *see*Defs.' Reply in Supp. of Mot. to Dismiss at 14-15, but this discussion reveals only that Congress granted substantive authority to allow a stay in one place and withheld authority to grant a stay elsewhere. It does not speak to the finality of a stay.[6]

In any event, Defendants have failed to account for the fact that this case involves the interplay between two governmental entities, OMB and EEOC, and by staying EEOC's collection of information, OMB has effectively stayed its own prior approval of the collection—an approval which was itself granted only after two rounds of notice and comment. *See* **81 Fed. Reg. 5113** ; **81 Fed. Reg. 45479** . Moreover, Defendants do not argue that judicial review would be unavailable if OMB had initially disapproved the collection of information by EEOC. *Cf.* **44 U.S.C. § 3507 (d)(6)** (expressly stating that certain actions are not subject to judicial review). If such disapproval would have been judicially reviewable, it does not make any sense that OMB could evade judicial review by first approving the collection and then staying it.

III. SUMMARY JUDGMENT

A. Legal Standard

When a plaintiff challenges an agency's final action under the APA, summary judgment "is the mechanism for deciding whether as a matter of law an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Louisiana v. Salazar*, **170 F. Supp. 3d 75** , **83** (D.D.C. 2016) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, **401 U.S. 402** , **415** (1971)). A court must "hold unlawful and set aside agency action" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." **5 U.S.C. § 706(2)(A)** .

B. Analysis of Whether the Stay Violates OMB's Regulations or is Arbitrary and Capricious

Under its own regulations, OMB may review a previously approved collection of information only when "relevant circumstances have changed or the burden estimates provided by the agency at the time of initial submission were materially in error." **5 C.F.R. § 1320.10(f)** . If either requirement is met, OMB may stay a prior approval of a collection of information not contained in a rule, but only for "good cause" shown and "after consultation with the agency." *Id.* **§ 1320.10(g)** . OMB has not shown that a relevant circumstance has changed or that the burden estimate provided was materially in error. Moreover, it has not shown good cause.

In staying EEOC's data collection, OMB stated that the "data file specifications for employers to use in submitting EEO-1 data . . . were not contained in the Federal Register notices as part of the public comment process nor were they outlined in the supporting statement for the [*19] collection of information." Rao Memorandum at 1. Therefore, OMB claimed that 1) "the public did not receive an opportunity to provide comment on the method of data submission to EEOC"; and 2) "EEOC's burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate." *Id.*

OMB's assertion that the data file specifications were not contained in the Federal Register, thereby depriving the public of an opportunity to comment on them, is misdirected, inaccurate, and ultimately unpersuasive. The claim is misdirected, because the data file specifications consisted of a sample spreadsheet and formatting specifications which explained how to format a spreadsheet; they did not change the content of the information collected. In both the Sixty-Day and Thirty-Day notices, EEOC described in detail the information it proposed to collect. The government's argument therefore focuses on a technicality that did not affect the employers submitting the data.

The government's claim that employers lacked an opportunity to comment on the data file specifications is strained, because the Thirty-Day Notice explicitly stated that for employers who were going to file through data uploads, the EEOC would post online the new data file specifications "for Components 1 and 2 of the modified EEO-1 as soon as OMB approves the information collection." 81 Fed. Reg. at 45487. Moreover, the Sixty-Day Notice directed employers to a website with sample data collection forms which provided "an illustration of the data to be collected by both Components 1 and 2 [of the revised EEO-1]." 81 Fed. Reg. at 5118. The sample spreadsheets in the data file specification match in all material respects the sample form provided in the Sixty-Day Notice. *Compare id.* with Link Decl. ¶ 8, Ex. E. Thus, employers not only knew that the data file specifications would be posted after OMB's approval, but also knew what the specifications would look like, putting the employers in a good position to comment if they desired.

Moreover, OMB gave its approval knowing that the Thirty-Day Notice stated that the file data specifications would be posted "as soon as" OMB approved the information collection. Plainly, OMB and employers expected *some* file specifications, so OMB's assertion that anyone was caught off guard by the mere posting of data file specifications rings hollow. Unable to point to any material variance between the sample form in the Sixty-Day Notice and the specifications ultimately posted, OMB's burden was to show how the file data specifications altered the content of the information required from employers or significantly increased the burden on employers in producing that information. OMB did not carry that burden. Moreover, OMB did not explain why posting the data file specifications after OMB approved the Component 2 collection should jeopardize the collection, when OMB had previously allowed data file specifications to be submitted after it approved EEO-1 forms. *See, e.g.*, Agency Information [*20] Collection Activities: Notice of Submission for OMB Review; Final Comment Request, **70 Fed. Reg. 71294** , 71301 (Nov. 28, 2005); Agency Information Collection Activities: Proposed Collection; Submission for OMB Review, **79 Fed. Reg. 72678** (Dec. 8, 2014).

OMB's assertion that "EEOC's burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate," Rao Memorandum at 1, is also unavailing. First, as noted, EEOC's sample form in the Sixty-Day Notice and description in both the Thirty-Day and Sixty-Day notices of the pay data that would be collected were consistent with the data file specifications. Second, OMB did not actually *find* that the data file specifications would change the initial burden estimates; rather, it stated that data file specifications "*may* change the initial burden estimate." Rao Memorandum at 1 (emphasis added). This equivocation is not surprising given that OMB's assertion was unsupported by any analysis.

The only "changed circumstance" alleged by OMB is the release of the data file specifications. But this is far from a "changed circumstance" in any meaningful sense. As mentioned, in the Thirty-Day Notice, EEOC informed OMB and the public that it would post file specifications after OMB approved the collection of information. After OMB approved the

collection of information, EEOC released the data file specifications. There was no changed circumstance. EEOC proceeded exactly as planned and as OMB had approved.

Moreover, OMB merely speculated that the initial burden estimate "may" be incorrect, while failing to support its speculation with any analysis. This omission is remarkable because OMB did not assert that EEOC's previous analyses were based on formats meaningfully different from the file data specifications. *See* 81 Fed. Reg. at 5119-20, 81 Fed. Reg. at 45492-95 (earlier burden analyses). OMB's unsupported conjecture falls short of showing *any*prior error, let alone a material one. "Though an agency's predictive judgments . . . are entitled to deference . . . deference to such ... judgment[s] must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, **755 F.3d 702** , **708** (D.C. Cir. 2014) (quotation marks and citations omitted) (alteration in original); *see also Water Quality Ins. Syndicate v. United States*, **225 F. Supp. 3d 41** , **70** (D.D.C. 2016) ("speculation ... is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis") (quoting *Horsehead Res. Dev. Co. v. Browner*, **16 F.3d 1246** , **1269** (D.C. Cir. 1994)).

OMB also failed to demonstrate good cause for the stay. It did not explain in any substantive way why it believed that the revised EEO-1 was contrary to PRA standards. *See Amerijet Int'l, Inc. v. Pistole*, **753 F.3d 1343** , **1350** (D.C. Cir. 2014) ("[A]n agency must explain 'why it chose to do what it did.' And to this end, conclusory statements will not do; an 'agency's statement must be one of *reasoning*.'") (emphasis in original) (quoting *Tourus Records v. Drug Enf't Admin.*, **259 F.3d 731** , **737** (D.C. Cir. 2001); *Butte Cty., Cal. v. Hogen*, **613 F.3d 190** , **194** (D.C. Cir. 2010)); *see also Bauer v. DeVos*, **325 F. Supp. 3d 74** , **105** (D.D.C. 2018) ("[T]he APA . . . requires that agencies 'provide an explanation that will enable the court to evaluate the **[*21]** agency's rationale at the time of decision.'") (citation omitted). OMB's stated reason when issuing the stay also conflicted with its prior findings that EEOC's data collection had practical utility, 81 Fed. Reg. at 45481-83, was designed to minimize the burden on reporting employers, id. at 45492-95, and provided adequate privacy and confidentiality protections, id. at 45491-92. OMB failed to explain these inconsistencies. *See Dist. Hosp. Partners, L.P. v. Burwell*, **786 F.3d 46**, **59** (D.C. Cir. 2015) ("We have often declined to affirm an agency decision if there are unexplained inconsistencies in the final rule."); *Bauer*, **325 F. Supp. 3d at 109** ("[T]he Department failed to acknowledge, much less to address, the inconsistency between its current view that those provisions stand on legally questionable footing, and its prior conclusion that they were legally sound. . . . [A]n unacknowledged and unexplained inconsistency is the hallmark of arbitrary and capricious decision-making.").[7]

An agency's action is arbitrary and capricious if the agency "(1) has relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) offers an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Am. Wild Horse Pres. Campaign v. Perdue*, **873 F.3d 914** , **923** (D.C. Cir. 2017) (quotation marks and citation omitted). While "[a]gencies are free to change their existing policies," in doing so they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, **136 S. Ct. 2117** , **2125** (2016) (citations omitted). OMB's action in staying EEOC's collection of Component 2 was arbitrary and capricious for the same reasons the agency violated its own regulation: OMB's decision to stay the collection of information totally lacked the reasoned explanation that the APA requires.[8]

In urging this court to uphold OMB's decision to stay EEOC's pay data collection, the government contends that "OMB's interpretation of its 'review and stay' regulations is entitled to deference," unless it is "plainly erroneous or inconsistent with the regulation," because "neither the PRA nor OMB's regulations define when 'relevant circumstances have changed,' what constitutes a 'material error' in the burden estimates initially provided, or when 'good cause exists.'" Defs.' Opp. to Pls. Mot. for Summ. J and Mot. for Summ. J. at 19-20. Plaintiffs counter that because "the Rao Memorandum is almost entirely conclusory, parroting regulatory language," it lacks reasoning and is not entitled to deference. Pls.' Reply in Supp. of Mot. for Summ. J. and Opp. to Defs.' Mot. for Summ. J. at 6, ECF No. 32. Moreover, Plaintiffs argue that OMB has previously articulated a definition of a "good cause" standard and should be held to it. In the preamble to a PRA regulation, OMB stated that good cause "exists when continued collection of information would be significantly contrary to the standards of the Act." Controlling Paperwork Burdens on the Public; Proposed Rulemaking, **47 Fed. Reg. 39515** , 39522 (Sept. 8, 1982). As part of this good **[*22]** cause standard, OMB must "take into consideration any disruption such reconsideration would create in the agency's program." *Id.* The government responds that as a general matter, preambles to rules are not binding on agency actions. *See* Defs.' Mot. for Summ. J. at 21 n.4.

The court need not decide whether the good cause standard provided in the preamble applies here. Even without holding OMB to those requirements, the court finds that OMB provided inadequate reasoning to support its decision to stay the data collection. Courts "do not defer to an agency's conclusory or unsupported suppositions." *Nat'l Shooting Sports Found., Inc. v. Jones*, **716 F.3d 200** , **214** (D.C. Cir. 2013) (quotation marks and citation omitted).

In further support of its claim that OMB's decision to stay EEOC's collection of Component 2 information is a reasonable interpretation of the regulations and supported by the record, the government relies on four letters OMB received in early 2017, after the posting of the file specifications. Defs.' Opp. to Pls.' Mot. for Summ. J. and Mot. for Summ. J. at 22-23. These letters, according to the government, expressed concern about the lack of adequate notice and comment and buttressed OMB's finding that "Component 2 could impose a burden on regulated entities." Id. at 23. However, the Rao Memorandum does not indicate that OMB relied on these comments or even took them into consideration. Moreover, one of the four letters (from the Chamber of Commerce) does not discuss the data file specifications. *See* Letter re Request for Review; EEOC's Revision of the Employer Information Report from Randel K. Johnson, Senior Vice President, Labor, Immigration & Employee Benefits and James Plunkett, Director, Labor Law Policy, U.S. Chamber of Commerce, to John M. Mulvaney, Dir., Office of Management and Budget (Feb. 27, 2017); JA046. The other letters do not provide any analysis or conclude that the data formatting specifications increase the burden on EEO-1 filers. An agency's speculation cannot suffice for APA review purposes. *Sorenson Commc'ns Inc.*, **755 F.3d at 708** . Similarly, an agency cannot simply rely on the speculation of commenters. Instead, the agency must conduct a critical examination of comments on which it relies. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, **737 F.2d 1095** , **1125** (D.C. Cir. 1984) (agency may not rely on comments "uncritically" and must apply its "expert evaluation"); *Am. Great Lakes Ports Ass'n v. Zukunft*, **296 F. Supp. 3d 27** , **39** (D.D.C. 2017) ("Thus, an agency may, for example, rely on comments submitted during the notice and comment period as justification for [a] rule, so long as the submissions are examined critically.") (quotation marks and citations omitted) (alteration in original). Finally, the government omits mention of the comments OMB received in support of the file data specifications. For instance, NWLC, with 82 organization signatories, submitted a comment on April 12, 2017, around the same time that OMB received the four letters it cites. NWLC explained both why the data file specifications did not increase any burden and did not constitute a change in circumstances. *See* Letter re Opposition to Reopening Review of the Equal **[*23]** Employment Opportunity Commission's Employment Information (EEO-1) Report (OMB Control Number 3046-0007), from NWLC, et al., to John M. Mulvaney, Dir., Office of Management and Budget (Apr. 12, 2017); JA115. Without explaining why, an agency cannot rely on some comments while ignoring comments advocating a different position. *AARP v. U.S. Equal Emp't Opportunity Comm'n*, **267 F. Supp. 3d 14** , **32** (D.D.C. 2017) ("An agency must explain *why* it chose to rely on certain comments rather than others.") (emphasis in original).

The government further contends that the Rao Memorandum "simply summarizes the four months of meetings, emails, and conference calls between OMB and EEOC during which each issue underlying the Administrator's decision to review and stay was discussed." Defs.' Opp. to Pls.' Mot. for Summ. J. and Mot. for Summ. J. at 30. Nothing in the record supports this claim. Further, the government's assertion does not mean that the discussions involved an analysis of evidence supporting a conclusion of changed circumstances or materially erroneous burden estimates. In fact, the only evidence in the record of documented agency analysis rejects the government's current contention about the data file specifications. According to an April 14, 2017 EEOC memorandum:

The EEOC's published filed specifications are not a new requirement but rather simply a familiar tool to make it easier for employers to submit EEO-1 data to the EEOC. The EEOC provided this tool to employers for use with the 2016 EEO-1, as evident on the EEOC website where the file specifications for the 2016 EEO-1 were published ... Like those later published for the EEO-1 pay data collection, the 2016 specifications were in comma-separated values format ("csv"), a format that enables employers to convert tabular data (like that in the EEO-1) for importation and exportation to a database. Employers that used data upload technology for their 2016 EEO-1 reports used these csv specifications. Publication of the file specifications after OMB's approval of the pay data collection is not a "significant" change that warrants OMB's reconsideration. As noted above, EEOC indicated in the 30-day notice its intent to post updated specifications, and stated that it would provide support to employers and HRIS vendors as they transitioned to the new reporting requirements. EEAC had notice of these data specifications, was probably familiar with the 2016 version, and had ample opportunity to raise questions or concerns before OMB's approval of the revised EEO-1, but did not do so. Memorandum from Peggy Mastroianni to Victoria Lipnic, Acting Chair, EEOC (Apr. 14, 2017); JA126.

The government now claims that Component 2 required "significant formatting changes." Defs. Mem at 23. But the Rao Memorandum did not reach that conclusion. Administrator Rao's letter said only that the data file specifications "may

have changed the initial burden estimate." Rao Memorandum at 1. Moreover, even if OMB had relied on a finding of "significant formatting changes" at the time of the stay, its conclusion would have lacked analytic and evidentiary support. [*24] This court cannot "fill in critical gaps in an agency's reasoning. We can only look to the [agency's] stated rationale. We cannot sustain its action on some other basis the [agency] did not mention." *Point Park Univ. v. NLRB*, **457 F.3d 42** , **50** (D.C. Cir. 2006); *see also NAACP v. Trump*, **298 F. Supp. 3d 209** , **237** (D.D.C. 2018) ("[B]ecause 'a reviewing court ... must judge the propriety of [agency] action solely by the grounds invoked by the agency,' *post hoc* explanations that the agency did not articulate when it acted are insufficient." (quoting *SEC v. Chenery Corp.*, **332 U.S. 194** , **196** , (1947)) (alteration in original).

The government's position rests on hyper-technical formatting changes that have no real consequences for employers. While there may be instances when formatting changes could be burdensome, that is not the case here. Similarly, it is conceivable that the government could impose formatting requirements that made the presentation of collected information far more difficult for employers. But in this case, OMB and the regulated entities knew what the formatting would look like before OMB gave its approval to the Component 2 collection, and the government has failed to demonstrate any likelihood that the data file specifications meaningfully increase the burden on employers. Indeed, neither the Rao Memorandum nor the administrative record as a whole demonstrates that before issuing its stay, OMB ever analyzed the data file specifications in an effort to determine whether they meaningfully changed the burden of collecting Component 2 information.

IV. REMEDY

Because the court has determined that OMB's stay of EEOC's pay data collection was illegal, it must fashion an appropriate remedy. The APA provides that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." **5 U.S.C. § 706(2)(A)** . The D.C. Circuit has stated that "vacatur is the normal remedy" for an APA violation. *Allina Health Servs. v. Sebelius*, **746 F.3d 1102** , **1110** (D.C. Cir. 2014). The APA "itself contemplates vacatur as the usual remedy when an agency fails to provide a reasoned explanation for its regulations." *AARP v. U.S. Equal Emp't Opportunity Comm'n*, **292 F. Supp. 3d 238** , **242** (D.D.C. 2017). The presumption of vacatur, "however, is not absolute, and a remand without vacatur may be 'appropriate [if] "there is at least a serious possibility that the [agency] will be able to substantiate its decision" given an opportunity to do so, and when vacating would be "disruptive."'" *Bauer v. DeVos*, **332 F. Supp. 3d 181** , **184** (D.D.C. 2018) (quoting *Radio-Television News Dirs. Ass'n v. FCC*, **184 F.3d 872** , **888** (D.C. Cir. 1999)) (alterations in original). "Courts in this Circuit . . . have long recognized that 'when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy.'" *Shands Jacksonville Med. Ctr. v. Burwell*, **139 F. Supp. 3d 240** , **267** (D.D.C. 2015) (quoting *Fertilizer Inst. v. EPA*, **935 F.2d 1303** , **1312** (D.C. Cir. 1991) (citation omitted) (footnote omitted)). A court's decision to remand without vacatur "depends on the 'seriousness of the order's deficiencies' and the likely 'disruptive consequences' of vacatur." *Allina Health Servs.*, **746 F.3d at 1110** (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory* [*25]*Comm'n*, **988 F.2d 146** , **150-51** (D.C. Cir. 1993)).

OMB's deficiencies were substantial, and the court finds it unlikely that the government could justify its decision on remand, despite its assertion that "OMB could easily cure the defects in its memorandum by further explanation of its reasoning." Defs.' Opp. to Pls.' Mot. for Summ. J. and Mot. for Summ. J. at 33. The government's deficiency is not that it failed to explain OMB's "reasoning," but that OMB's reasoning lacked support in the record.

The government also argues that "vacatur *could* upset the current expectation of filers, who *may* not be aware of this litigation nor its potential impact on their obligation to complete their Component 2 submissions." Defs.' Reply in Supp. of Mot. to Dismiss or in Alt. Mot. for Summ. J. at 19 (emphasis added), ECF No. 36. This speculation is unsupported by the record. Moreover, the revised pay data collection had been in place for almost a year by the time it was stayed. The government's argument that a stay is only temporary further undercuts its argument that vacatur would be disruptive, because affected entities were on notice that the stay could be withdrawn at any time. The court therefore finds that vacatur will not have potentially disruptive consequences.

Accordingly, this court finds that both *Allied-Signal* factors favor vacatur as the appropriate remedy.

V. CONCLUSION

For the foregoing reasons, the court hereby **DENIES** Defendants' Motion to Dismiss, ECF No. 11; **GRANTS** Plaintiffs' Motion for Summary Judgment, ECF No. 22; **DENIES** Defendants' Motion for Summary Judgment, ECF No. 27; and **VACATES** OMB's stay of the EEOC's revised EEO-1 form and the September 15, 2017 Federal Register Notice (Stay the Effectiveness of the EEO-1 Pay Data Collection, **82 Fed. Reg. 43362**) announcing the same.

It is further **ORDERED** that the previous approval of the revised EEO-1 form shall be in effect.

Date: March 4, 2019

/s/ Tanya S. Chutkan

TANYA S. CHUTKAN

United States District Judge

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fn 1

Certain federal contractors and subcontractors with more than fifty employees are also subject to this requirement, which is enforced by the U.S. Department of Labor Office of Federal Contract Compliance Programs ("OFCCP"). **41 C.F.R. § 60-1.7(a)** .

fn 2

This webpage is no longer active. Decl. of Benjamin Link ¶ 3, ECF No. 22-2.

fn 3

Plaintiffs note that EEOC's expressed intention to publish reports is consistent with its "historical practice of publishing annual reports based on aggregate EE0-1 data, in addition to periodic industry specific reports." Pls.' Opp. to Defs.' Mot. to Dismiss at 34, ECF No. 16 (citing EEOC, Job Patterns for Minorities and Women in Private Industry (EEO-1), https://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm).

fn 4

Moreover, even if the court were to determine that OMB's stay is an adjudication, Plaintiffs would still have standing to challenge it, because they "point [] to a particular imminent application of the disputed agency policy, the firmness of which is not in dispute, on a fast-arriving date certain." *Conference Grp., LLC v. FCC*, **720 F.3d 957** , **964** (D.C. Cir. 2013) (quotation marks and citation omitted) (alteration in original).

fn 5

Given this finding, the court does not need to reach Plaintiffs' additional standing claims.

fn 6

Defendants suggest that the notice and comment underpinnings of the rule stayed in *Clean Air Council* were critical to the court's finding that the stay amounted to final action. *See* Defs.' Reply in Supp. of Mot. to Dismiss at 17. However, the language that Defendants quote does not come from the portion of the opinion dealing with the finality of the stay; it comes from the portion of the opinion finding the stay arbitrary and capricious.

fn 7

OMB did not explain why a stay was necessary, when the percentage of employers likely to use data upload is small, perhaps as low as two percent, 81 Fed. Reg. at 5119 n.55, 5120 n.62, and no employer is required to use data upload rather than data entry.

fn 8

Because the court finds that OMB's stay of EEOC's pay data collection violated the PRA and was arbitrary and capricious, it does not need to reach Plaintiffs other arguments.

MOHAMMAD PERVAIZ

From: Kaylin, Anthony <akaylin@aseonline.org>
Sent: Monday, March 11, 2019 8:19 AM
To: CHRIS HAFFER
Subject: RE: EEO-1 SURVEY FOR 2018 WILL OPEN MARCH 18, 2019

Thanks sir!

Anthony Kaylin
American Society of Employers
19575 Victor Parkway Suite 100
Livonia, MI 48152
Tel: (248) 223-8012
Cell: (734) 881-3550
akaylin@aseonline.org
www.aseonline.org

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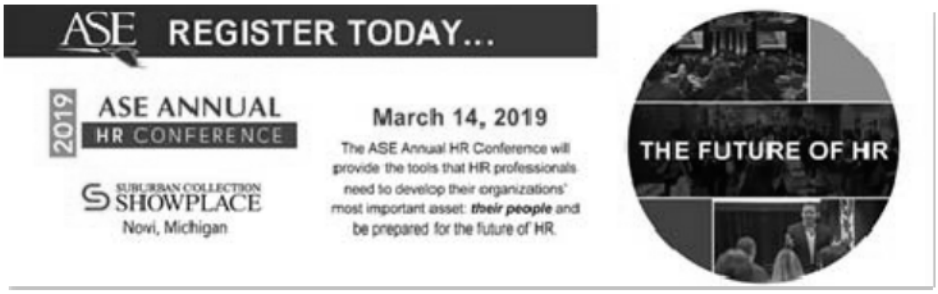

From: CHRIS HAFFER <CHRIS.HAFFER@EEOC.GOV>
Sent: Monday, March 11, 2019 8:14 AM
To: Kaylin, Anthony <akaylin@aseonline.org>
Cc: CHRIS HAFFER <CHRIS.HAFFER@EEOC.GOV>
Subject: Re: EEO-1 SURVEY FOR 2018 WILL OPEN MARCH 18, 2019

No mistake - we are moving forward with opening data collection for the 2018 traditional EEO-1 data (aka Component 1) beginning next Monday.

As for the US District Court ruling regarding compensation data (aka Component 2), EEOC Office of the Chair and Office of Legal Counsel are deciding how to best move forward.

From: Kaylin, Anthony <akaylin@aseonline.org>
Sent: Monday, March 11, 2019 07:49
To: CHRIS HAFFER
Subject: FW: EEO-1 SURVEY FOR 2018 WILL OPEN MARCH 18, 2019

Hope all is well. Was this sent out by mistake?

Anthony Kaylin
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Tel: (248) 223-8012
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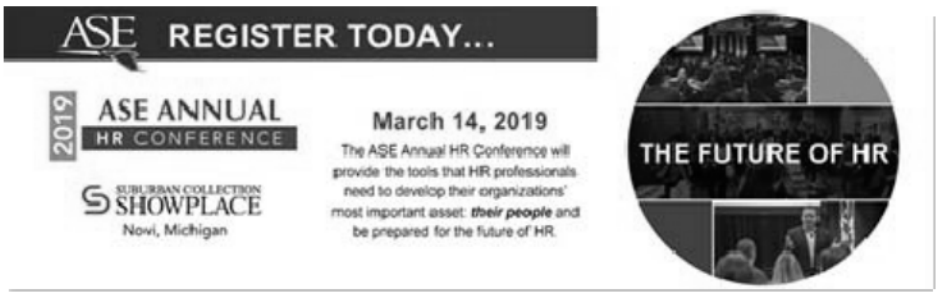

From: U.S. Equal Employment Opportunity Commission <noreply@eeoc.gov>
Sent: Saturday, March 9, 2019 11:34 AM
To: Kaylin, Anthony <akaylin@aseonline.org>
Subject: EEO-1 SURVEY FOR 2018 WILL OPEN MARCH 18, 2019

U.S. Equal Employment Opportunity Commission

The U.S. Equal Employment Opportunity Commission (EEOC) will officially open the 2018 EEO-1 survey on March 18, 2019. The deadline to submit EEO-1 data has been extended until May 31, 2019. The EEO-1 is an annual survey that requires all private employers with 100 or more employees and federal government contractors or first-tier subcontractors with 50 or more employees **and** a federal contract, subcontract or purchase order amounting to $50,000 or more to file the EEO-1 report. The filing of the EEO-1 report, is required by federal law per Section 709(c), Title VII of the Civil Rights Act of 1964, as amended; and §1602.7–§1602.14, Title 29, Chapter XIV of the Federal Code of Regulations.

Filers should refer to the EEO-1 website at (https://www.eeoc.gov/employers/eeo1survey/index.cfm) for general information about the 2018 EEO-1 collection.

If you have an EEO-1 company contact update, please send an email to e1.lostloginpassword@eeoc.gov. If your company has experienced any mergers or acquisitions between January 1, 2018 and December 31, 2018, please email E1.Acquisitionsmergers@eeoc.gov. Any spinoff-related emails should be sent to E1.SPINOFFS@EEOC.GOV. For all other inquiries, please send an email to E1.Techassistance@eeoc.gov.

The EEOC advances opportunity in the workplace by enforcing federal laws prohibiting employment discrimination. More information is available at www.eeoc.gov. Stay connected with the latest EEOC news by subscribing to our email updates.

MOHAMMAD PERVAIZ

From: Candee Chambers <candee@directemployers.org>
Sent: Monday, April 01, 2019 4:26 PM
To: VICTORIA A. LIPNIC
Subject: Amicus Curiae Brief for the NWLC v. OMB et al
Attachments: Brief of Amici Curiae 19-04-01.pdf; 19-3-30 Signed and Dated C. Chambers Dec_.pdf

Hi, Vicki.

I hope you are doing well and I hope you remember me…we met at Tony Kaylin's EEO Conference in Michigan a year or two ago. I work with DirectEmployers Association and we are an employer-owned and managed trade association with over 920 Member companies such as Google, LinkedIn, Apple, Microsoft, Northrup Grumman, Lockheed Martin, etc. I am sending this note to you because each week we write and publish our Week In Review ("WIR") and before it goes to print this afternoon, I want to give you a heads-up to the Amicus Curiae brief we filed today in the above referenced lawsuit. We surveyed our Members and a large subset of them responded in a mere three days. We found that at least 70% of the respondents will not be able to complete the "Hours Worked" or "Pay Data" requirements by May 31, 2019. More importantly, 82% said they will need all of the time until the regular reporting cycle in 2020 to report complete and accurate data in the both the "Hours Worked" and "Pay Data" categories. Some very enlightening concerns and I wanted to share these documents with you before you see them in our WIR this afternoon or hear about it elsewhere.

Please don't hesitate to ask any questions you may have. I also included the American Society of Employers in our brief as Tony Kaylin was very interested in participating as well.

Candee J. Chambers SPHR, SHRM-SCP, SR. CAAP | Executive Director & CEO | DirectEmployers Association & Recruit Rooster
p 317.874.9052 | **m** 614.795.3765 | **e** candee@directemployers.org | DirectEmployers.org

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al.*,	)	
Plaintiffs,	)	
v.	)	
OFFICE OF MANAGEMENT AND BUDGET, *et al.*,	)	Civil Case No. 1:17-cv-02458 (TSC)
Defendants.	)	

BRIEF OF *AMICI CURIAE*
DIRECTEMPLOYERS ASSOCIATION, INC. and AMERICAN SOCIETY OF EMPLOYERS IN SUPPORT OF DELAYING SUBMISSION OF EEO-1 COMPONENT 2 DATA UNTIL REPORTING OF 2019 PAY INFORMATION

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Counsel for Amici Curiae

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STATUTES AND REGULATIONS

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

DirectEmployers Association, Inc. ("DE") and the American Society of Employers ("ASE") (collectively "*Amici Curiae*") submit this Brief in support of Defendants' position as to compliance with this Court's March 4, 2019 Order vacating the Office of Management and Budget's stay of the Equal Employment Opportunity Commission's revised EEO-1 Survey and the September 15, 2017 *Federal Register* Notice (82 Fed. Reg. 43362) announcing the same.[1] *Amici Curiae* submits this Brief on behalf of their Member companies as the "missing party" impacted as to any question regarding the timing of the called-for reporting of pay data as Component 2 to the EEO-1 Survey required of certain employers (hereinafter "Component 2 reporting"). *Amici Curiae* do not concern themselves with the merits of the dispute between the parties (as the Court has decided the merits issues). Rather, *Amici Curiae* take as a given the Court's Order that Component 2 reporting will occur. The question now and suddenly before this Court is thus not whether, but only when, Component 2 reporting shall begin.

Based on employer data collected in late March 2019 from DE Member companies in a customized Survey, DE and ASE seek a reasonable runway of time to prepare for and deliver complete and accurate data in response to Component 2 reporting. That reasonable runway for the vast majority of DE Members would be the next EEO-1 Survey reporting period in the Spring of 2020, as noted more fully below.

Amici Curiae offer the unique perspective not possessed by either party to the pending case as to the time necessary for employers to provide the at-issue employer compensation data. *Amici Curiae* have surveyed DE's 900+ Member companies (essentially the Fortune 1000) and can report

[1] This brief was authored in whole by DE's outside counsel, Fox, Wang & Morgan P.C., with assistance from local counsel Isler Dare, P.C., and no party's counsel authored this brief in whole or in part. No party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the amici curiae and their Members, contributed money that was intended to fund preparation or submission of this brief.

from recent real-time empirical information that (a) this is not a simple "Hit the Send button" and comply data delivery, and (b) it is not possible for the vast majority of DE Member companies, at this late date, to supply the Component 2 reporting by May 31, 2019. It is simply impractical and would be an exercise in futility for the Court to require reporting of employee W-2 earnings and hours worked data as part of Component 2 reporting by May 31, 2019. Were the Court to order a May 31, 2019 reporting date, DE's Survey, described more fully below, reveals that there would necessarily be widespread forced non-compliance given the inability of even well-intentioned companies to comply and report Component 2 reporting by May 31, 2019.

DirectEmployers Association, Inc.

DE represents the largest consortium of federal government contracting businesses in the United States, all of which are also employers with 100 or more employees and almost all of which are required to annually file the EE0-1 Survey (university Members are not as they file IPEDS reports; neither are state government employer Members which file EEO-4 Surveys). Established in 2001, DE is a Member-owned and managed non-profit consortium of over 920 companies, most of them from within the Fortune 1000. DE is organized in Indiana, and its headquarters office is in Indianapolis, Indiana.

DE specializes in talent acquisition and helping companies comply with the regulatory obligations the Office of Federal Contract Compliance Programs ("OFCCP") imposes on covered federal government contractors and subcontractors. As an Association, DE seeks to bring compliance professionals together to cultivate labor market efficiencies and reduce costs for employers. DE's services assist contractors in complying with the OFCCP's Vietnam Era Veterans' Readjustment Assistance Act, (38 U.S.C. § 4212 ("Section 4212")) mandatory job listing requirements and the outreach and positive recruitment requirements of both Section 503 of the Rehabilitation Act of 1973 ("Section 503") and Section 4212. DE's innovative Partner

Relationship Manager (PRM) aids employers in tracking, recording, and maintaining partner outreach efforts with diversity, disability, veteran, female, and other minority organizations. DE also daily delivers over two million jobs its Members have available to state workforce (employment) agencies throughout the country through a data pipeline known as the National Labor Exchange (NLx), which is widely viewed as the backbone of our nation's state employment offices.

American Society of Employers

ASE is a not-for-profit employer association serving Michigan's business community. Member organizations rely on ASE to be their source for information and support on all matters affecting the employment relationship. Since 1902, ASE's principal function has been to provide people-management information and services to address Human Resource issues Michigan employers face. ASE Members include Ford Motor Company, General Motors Company, and Henry Ford Health Systems.

Amici Curiae have a strong and demonstrable interest in this case because almost all of their Member companies are subject to the Title VII EEO-1 reporting requirement, and thus will be affected by the newly reinstated requirement mandating Component 2 reporting by May 31, 2019. Realistically, because guidance from the U.S. Equal Employment Opportunity Commission ("EEOC") as to the submission of such information may not be available until April 3, 2019 at the earliest, employers in fact will have only a little more than one month to know how to report the relevant data, gather budget to write code to extract the data in the way called for, quality control check the reporting results to test the data to ensure they are complete and accurate, and design upload reports to deliver the data to the EEO-1 reporting portal in the manner and format required. With such a short timeframe, *Amici Curiae* on behalf of their employer Members seek to provide

information that would warrant implementation of the Component 2 reporting as part of the 2019 EEO-1 Survey due next Spring 2020.

II. ARGUMENT

A. INTRODUCTION

Plaintiffs seek information from Defendants related to compliance with the Court's March 4, 2019 Order vacating the stay related to reporting of Component 2 reporting in EEO-1 Reports. Plaintiffs also seek information from Defendants to provide guidance to the Court related to expectations for compliance with the Court's Order. While not explicitly stated, Plaintiffs imply that they seek a remedy from this Court requiring Defendants to implement Component 2 reporting by employers as part of the 2018 EEO-1 Survey due by May 31, 2019.

However, the practical implication of requiring Component 2 reporting by May 31, 2019 is that the processing time needed for employers to reasonably comply is measured in months, and not days or even weeks. Furthermore, because of the timeframe anticipated by a reporting deadline of May 31, 2019, the very probable outcome would be the production of either no report, or incomplete and/or inaccurate pay data to the EEOC that would leave Plaintiffs' objectives in requiring production of such data unfulfilled.

B. REQUIRING COMPONENT 2 REPORTING BY MAY 31, 2019 IS SIMPLY NOT POSSIBLE FOR THE VAST MAJORITY OF EMPLOYERS

A confidential Survey of DE employer Member companies subject to the Component 2 reporting requirements reveals that fewer than 30% of them could comply with the Component 2 reporting requirement by May 31, 2019.[2] The Component 2 reporting breaks into two parts:

[2] All of DE's employer Members (other than universities and public employers, which file like reports) will be required to produce Component 2 reporting as part of their EEO-1 reporting obligations due to their employment of 100 or more employees. *See* Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45479, 45483 (July 14, 2016).

(1) "Hours Worked" reporting, broken down by race, sex, and ethnicity for employees within each of the 10 EEO-1 reporting categories and sorted within each of the 12 new pay bands; and (2) "Pay Data" reporting, broken down by race, sex, and ethnicity within each of the 10 EEO-1 reporting categories and sorted within each of the 12 new pay bands. DE surveyed its employer Members regarding time-to-delivery of each kind of data required, since different computer systems and different vendors and electronic data integration tools (to the extent vendors are involved) capture and report the two kinds of data Component 2 reporting seeks. The eight-question DE Survey was made up of two sets of four questions: the first set of four questions related to "hours worked" reporting and the second set of four questions related to total employee counts for the "pay data" reporting (since some employers can more quickly comply with one requirement as opposed to the other).

In response to a Bloomberg Law article dated March 20, 2019 reporting this Court's decision that Defendants had until April 3, 2019 to advise this Court whether employers would have to turn over Component 2 reporting by the May 31, 2019 deadline, DE conducted a confidential Survey of its employer Members through SurveyMonkey, an online survey development cloud-based software. The online, confidential Survey was open to DE employer Members from March 21, 2019 until 3:00 p.m. Eastern Standard Time on March 25, 2019. In that time, DE received 178 responses from its employer Members, though not all Members answered every one of the eight questions provided on the Survey.

"Hours Worked" Reporting

As to the "hours worked" data which Component 2 reporting requires, 129 out of 178 employers (72.5%) who responded to the question about the "hours worked" requirement reported they would not be able to report the total number of hours worked at each establishment broken down by race, sex, and ethnicity for employees within each of the 10 EEO-1 reporting categories

and sorted within each of the 12 pay bands identified as part of the Component 2 reporting by May 31, 2019. Only approximately 27.5% of DE's employer Members reported their ability to provide the "hours worked" data of the Component 2 reporting by May 31, 2019. *See* **Exhibit A** to the **attached** Declaration of Candee J. Chambers, Executive Director of DE, which is a true and correct compilation of DE's confidential Member Survey results as reported by the SurveyMonkey software.

Also, 98 out of the 129 employers reporting that they could not be ready to report by May 31, 2019 cited staffing limitations as an issue, while 100 out of those same 129 employers also cited technology limitations (employers were free to denote both limitations as an issue, hence the differing number of employers replying to one limitation operating on their company versus another limitation). *Id.* Additional Member comments concerning the inability to gather hours worked data before May 31, 2019 related to the need to re-deploy staff members to design and undertake the needed reporting, insufficient time to prepare the data, need for customized computer programming, the need to acquire or build electronic and computerized data sorting tools, need to create templates for upload, reliance upon third-party payroll vendors for data, and difficulty gathering data due to the data not being centrally stored or stored on multiple electronic platforms. *Id.*

In reference to whether the employer would need to seek a new budget allocation within the company to secure either more IT/software or more data clean-up services, or to pay vendor delivery fees (Question 4 of the Survey), 107 out of 166 employer Members who responded to the question (64.5%) reported they would need to start a new mid-budget year budget amendment process to obtain new budgetary allocations within the company to secure more IT/software or more data clean-up services, or to pay vendor delivery fees. *Id.*

In reference to the earliest date by which companies could accurately and completely report the requested "hours worked" data as part of the Component 2 reporting (Question 3 of the Survey), 91 employers out of 121 employers who responded to Question 3 (81.8%) reported that they would need until the time the next EEO-1 Survey reporting cycle in 2020 was due to be able to provide complete and accurate Component 2 reporting.[3] *Id.* Only 22 of the 121 employers that responded to Questions 3 (18%) reported that they could be ready to report the "hours worked" data by September 30, 2019 (the end of FY2019). Thus, collectively, only 71 employers (49+22) of 178 (40%) could be ready to file the "hours worked" portion of Component 2 by the end of Fiscal Year 2019, six months from now.

"Pay Data" Reporting

As to the "pay data" which Component 2 reporting requires, 113 out of 161 employers (70.2%) who responded to the question about uploading the total number of employees within each pay band reported they would not be able to report the total number of employees broken down by race, sex, and ethnicity within each of the 10 EEO-1 reporting categories and sorted within each of the 12 pay bands identified as part of the Component 2 reporting by May 31, 2019. *Id*. This means that fewer than 30% of the surveyed employer Members of DE noted an ability to report the total number of employees in each pay band for "pay data" purposes by May 31, 2019.

Specifically, 94 out of the 112 (84%) employers answering why they could not be ready to report by May 31, 2019 cited staffing limitations as an issue, while 91 out of those same 112 employers (81%) cited technology limitations. *Id*. Additional comments concerning the inability to gather the number of employees in each pay band before May 31, 2019 related to the need for customized computer programming and data sorting, reliance on payroll vendor reports, and

[3] Those employers who responded to Question 1 that they could report hours worked data by May 31, 2019 did not answer Questions 2, 3, and 4, which asked about employers which could not file by May 31, 2019.

having to manually obtain and integrate race, sex, and ethnicity information since those are not normally part of payroll records. *Id*.

In reference to whether the employer would need to seek a new budget allocation within the company to secure either more IT/software, secure more data clean-up services, or to pay vendor delivery fees to obtain data reporting the total number of employees in each pay band (Question 8 of the Survey), 105 out of 159 (66.0%) employer Members who responded to the question reported they would need to start a new mid-budget year budget amendment process to obtain new budgetary allocations within the company to secure more IT/software, to secure more data clean-up services, or to pay new vendor delivery fees to obtain employee totals by race, sex, and ethnicity for each pay band. *Id*.

In reference to the earliest date by which companies could accurately and completely report the requested number of employees in each pay band as the "pay data" part of the Component 2 reporting (Question 7 of the Survey), 91 employers out of the 111 employers who responded to Question 7 (82.0%) reported that they would need until the time of the next EEO-1 Survey reporting cycle in 2020 was due to be able to provide complete and accurate Component 2 reporting as to the total number of employees in each pay band by race, sex, and ethnicity.[4] *Id*.

Given the foregoing evidence from employers actually tasked with satisfying the requirements of the Component 2 reporting, a May 31, 2019 reporting date is simply not feasible. The parties have simply missed the 2018 reporting year for lack of enough forewarning to the employer community of the called for reporting date. Spooling up the called for reporting data is clearly a complicated procedure requiring most companies more than six months' notice.

[4] Those employers who responded to Question 5 that they could report total employees in each pay band by May 31, 2019 did not answer Questions 6, 7, and 8, which asked about employers which could not file by May 31, 2019.

C. REQUIRING COMPONENT 2 REPORTING BY MAY 31, 2019 WOULD DEFEAT THE VERY PURPOSE PLAINTIFFS PROVIDE AS THE REASON FOR SEEKING TO VACATE THE PRIOR STAY

Given the potential issues with providing accurate and complete data by May 31, 2019, implementing Component 2 reporting by May 31, 2019 would defeat the very objective Plaintiffs sought to obtain in bringing suit, and would leave their stated interests unfulfilled. As this Court noted in its Memorandum Opinion dated March 4, 2019, both the National Women's Law Center ("NWLC") and the Labor Council for Latin American Advancement ("LCLAA") claim injury resulting from the Office of Management and Budget's ("OMB") prior stay as to the revised EEO-1 Survey due to their inability to more robustly advocate on behalf of their constituents with additional data and analyses. Possession of the Component 2 reporting would allow NWLC, it told this court, to "focus its resources, analysis, and advocacy on the jobs, industries, and regions where intervention is most urgent," and allow LCLAA to improve its ability "to negotiate with and educate employers and to fulfill LCLAA's mission of improving the condition of Latinos and Latinas in the workplace." However, without accurate and complete information, Plaintiffs would be placed in the same position as if the stay had not been lifted.

Specifically, as evidenced by the employers' responses to DE's Survey, the only way for Companies obligated to report by May 31, 2019 would be to rely on those resources currently available, without the budget and manpower necessary to ensure any data delivery, let alone one which was both complete and accurate.

Moreover, given the limited period of time to review and comprehend any guidance from the EEOC as to the formatting of required reporting, employers are left to make assumptions about the limited guidance the EEOC has been able to offer thus far. Finally, and most importantly, given the time constraints, at best, employers will have incomplete information to report, and without the time necessary to test and verify their data, let alone test or verify data from third-party

payroll or Human Resource vendors from which the vast number of employers must procure the information, given that such vendors may physically house and control hours and pay data for many employers.

Obtaining either (a) no data; (b) incomplete data; or (c) inaccurate data would run afoul of the very purposes for which Plaintiffs sought the data: to accurately analyze them. At this point, implementation of the Component 2 reporting in relation to 2018 pay information would not provide quality information to the government, nor would it minimize the burden imposed on employers required to produce these data. Only with a proper runway of time and guidance to reporting employers (such as would be available by installing the Component 2 reporting due in the spring of 2020 for 2019 pay and hours of work data) and telling those employers NOW that the reports would (positively, absolutely) be due then, can Plaintiffs' interests be served.

III. CONCLUSION

Based on the foregoing, *Amici Curiae* respectfully request this Court to require compliance with this Court's March 4, 2019 Order (vacating the prior stay) beginning with the 2020 EEO-1 Survey containing 2019 calendar year data, and for such further relief as this Court may deem just and proper.

April 1, 2019

Respectfully Submitted,

/s/ Edward Lee Isler

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al.*, Plaintiff, v. OFFICE OF MANAGEMENT AND BUDGET, *et al.*, Defendants.	Civil Case No. 1:17-cv-02458 (TSC)

DECLARATION OF CANDEE CHAMBERS IN SUPPORT OF *AMICI CURIAE* BRIEF

In support of Movants DirectEmployers Association, Inc. ("DE") and the American Society of Employers' ("ASE") *Amici Curiae* Brief, I, Candee J. Chambers, do declare as follows:

1. I am the Executive Director of DE, a position I have held since 2017. I have been with DE since 2013, and previously served as DE's Vice-President of Compliance and Partnerships, where I oversaw the creation of strategic partnerships with a multitude of organizations, and managed the relationship with the National Association of State Workforce Agencies. In addition to my current daily responsibilities as Executive Director, I regularly provide guidance to DE's employer members related to Affirmative Action regulations, Affirmative Action Plan development, outreach responsibilities to organizations related to

diversity in employee selection and retention. I also serve as Chair of the Indiana Industry Liaison Group.

2. I hold a Senior Professional in Human Resources certification ("SPHR"), and a certification as a Senior Certified Professional ("SHRM-SCP") from the Society for Human Resource Management ("SHRM"). I am also a Senior Certified Affirmative Action Professional ("SR. CAAP").

3. I have personal knowledge of the following facts in this declaration; except as to those matters stated on information and belief, and as to those matters I believe them to be true. If called upon as a witness, I could and would testify competently thereto. I am making this declaration in support of the Amicus Brief being filed by DE and ASE.

4. On March 18, 2019, as Executive Director of DE, I became aware of Plaintiffs' request for a Status Conference in determining the U.S. Equal Employment Opportunity Commission's ("EEOC") compliance with the court order vacating the stay in reporting of employee compensation data ("Component 2" data) on regulatorily required EEO-1 Surveys in the matter of *National Women's Law Center, et al. v. Office of Management and Budget, et al.*, U.S. District Court for the District of Columbia, Case No. 1:17-cv-02458 (TSC). As DE is an employer member-owned and managed non-profit corporation that maintains partner outreach efforts on behalf of its employer members with diversity, disability, veteran, female, and other minority organizations, efforts related to collection of employee compensation data by the EEOC from employers is an issue of significance to DE and its employer members.

5. On March 20, 2019, I received notice via an article in Bloomberg Law of this Court's decision during a March 19, 2019 status conference that federal agencies had until April 3, 2019 to advise the court whether employers would have to turn worker pay data over to the government by the May 31, 2019 deadline for submission of the 2019 EEO-1 Report.

https://www.bloomberglaw.com/exp/eyJjdHh0IjoiRExOVyIsImlkIjoiMDAwMDAxNjktOTZiOS1kOGY3LWFiN2QtZGVmZjAwOGEwMDAyIiwic2lnIjoiaENTSHVSR0Nxb25hOUpDOUxCNm1zTW9GSHpZPSIsInRpbWUiOiIxNTUzMDgwMTc0IiwidXVpZCI6ImFNSW5saWc4RFdnbVBvZmsyT2xQNWc9PTRHRG84WTEyZW5IaTZzNmNCV1JnSUE9PSIsInYiOiIxIn0=?usertype=External&bwid=00000169-96b9-d8f7-ab7d-deff008a0002&qid=6281647&cti=LFSM&uc=1320029013&et=FIRST_MOVE&emc=bdlnw_bf:6&bna_news_filter=true.

6. The BNA article reported that this Court would set a deadline by which the EEOC would have to begin collecting Component 2 data as part of the EEO-1 Survey.

7. Based on this information, on March 20, 2019 DE began to prepare a survey for its employer members regarding the ability of its members to provide Component 2 pay data as part of the 2018 EEO-1 Survey due by May 31, 2019 to provide this Court relevant information related to the setting of any deadline for the due date for collection of Component 2 pay data.

8. DE provided its over 920 employer members the survey on Thursday, March 21, 2019, with responses due by 3:00 p.m. on Monday, March 25th. In that time, DE received 178 responses from its employer members to the survey, though some only answered questions relevant to them. Because our Surveys of Members are always confidential to allow for candid reporting, we do not know exactly which Members responded to our pay data reporting Survey. However, our 923 Members heavily populate the Fortune 1000 List and include many major companies including Amazon, Boeing, Google, LinkedIn, Facebook, Northrup-Grumman, Cisco Systems, John Deere, CVS, International Paper Company, KPMG, Lockheed Martin, FedEx, Eli Lilly, American Electric Power, and Cardinal Health Systems, among others.

9. Attached as **Exhibit "A"** to this declaration is a true and correct copy of the results of the survey DE provided to its employer members, and a summary of the responses

Members provided as to the ability of employers to provide Component 2 pay data on the 2019 EEO-1 Survey due by May 31, 2019, or by the end of the federal Fiscal Year (September 30, 2019) or by the next EEO Survey reporting Survey window in the Spring of 2020, and some of the reasons why any deadline would not be feasible.

I declare under the penalty of perjury that the foregoing is true and correct.

Respectfully Submitted,

Dated: March 30, 2019

Candee J. Chambers

Candee J. Chambers
DECLARANT

MOHAMMAD PERVAIZ

From: Freedman, Marc <MFreedman@USChamber.com>
Sent: Wednesday, April 03, 2019 5:52 PM
To: VICTORIA A. LIPNIC
Subject: invite to our LRC meeting

Vicki:

Given all the activity (and that is my euphemism) around the EEO-1 we were wondering if you would like to spend a few moments with our EEO Subcommittee at our upcoming LRC meeting. This is the subcommittee that Camille chairs. The meeting will be 1:15-2:15 on May 21. It will be a mere 10 days before May 31, which may or may not mean anything by then.

Hope you can join us.

Thanks,
Marc

Marc Freedman
Vice President, Workplace Policy
Employment Policy Division
U.S. Chamber of Commerce
(202) 463-5535--direct
(202) 255-5295--mobile

MOHAMMAD PERVAIZ

From: Barbara Kelly <Barbara.Kelly@theinstitute4workplaceequality.org>
Sent: Thursday, April 04, 2019 1:28 PM
To: CHRIS HAFFER
Subject: Details of The Institute Annual Summit on May 1-2
Attachments: 2019-Institute-Annual-Summit-Agenda-04.01.2019.pdf; Institute-2019-Annual-Summit-Brochure.pdf

Hi Chris: – provided are additional details for our annual summit coming up in a few weeks. Please let me know if you need anything else. You are free to attend as much of conference as you would like and are able to. We look forward to having you join us.

May 1 -2 Annual Institute Summit – Brochure and Agenda attached

Location Information:
Hosted at the Falls Church, VA offices of Northrop Grumman
2980 Fairview Park Drive
Falls Church, VA 22042
*Secure location so you must bring photo id (i.e. driver's license or passport) that matches the information you provided to us for your registration.

Attire: Professional Business Casual

Conference Meals: Breakfast, lunch, snacks are provided to registered attendees both days

Wednesday, May 1

- EEOC Dr. Chris Haffer schedule to present from 2:45-3:30 PM

Wednesday, May 1
5:00PM -6:30 PM

- Attendee Reception (drinks and hors d'oeuvres)
- Hyatt House at 8296 Glass Alley, Fairfax, Virginia, 22031
- (We have a small shuttle transporting to/from Northrop Grumman to Hotel for those without a car)

7:30-9:30 PM

- Institute Leadership, Faculty and Guest Presenters Dinner
- 2941 at 2941 Fairview Park Drive, Falls Church, VA

Thursday, May 2

- OFCCP Craig Leen is scheduled for 8:45 – 9:30 AM
- OFCCP Bob LaJeunesse is scheduled for 12:45-1:30 PM

Wi-Fi: Will be available during the conference.

Please let me know what else you need.

Sincerely,

Barbara L. Kelly, Director

The Institute for Workplace Equality
1920 I Street NW
Washington, DC 20006
(303) 304-7200; (202) 293-2220 D.C. office
E-mail | Website

The Institute for WORKPLACE EQUALITY

an employer membership association

The Institute for WORKPLACE EQUALITY

2019 Annual Summit

The Institute for Workplace Equality two-day Annual Summit is an important and timely conference for federal contractors. With new leadership, new directives and a commitment to transparency unseen in previous administrations, it is imperative federal contractors stay up to speed on the latest compliance developments.

Join us as The Institute's conference faculty and special government agency guests will provide participants with the most in-depth insights into the latest activity at OFCCP, EEOC and other federal agencies.

May 1st

8:00- 8:30	REGISTRATION, BREAKFAST, & NETWORKING
8:30- 8:45	Conference Welcome and Introductions
8:45-9:30	Washington's Insiders: What's new with the OFCCP and EEOC – *David Cohen, David Fortney, Mickey Silberman*
9:30-10:15	OFCCP Audits are Coming, Are you Prepared? – *David Cohen, Michelle Duncan*
10:15-10:30	BREAK AND NETWORKING
10:30-11:00	503 Focused Reviews are Here, What do you Need to Know? – *Lynn Clements, Christy Kiely*
11:00-11:30	Preparing for OFCCP Compliance Checks - *David Cohen, Mickey Silberman*
11:30-12:00	When Details of an Open OFCCP Audit become Public - *David Fortney, Valerie Hoffman*
12:00-1:00	LUNCH
1:00-2:00	***Breakout Sessions*** (Select one) A. Workday and other HRIS and ATS Systems - *Valerie Hoffman, Christy Kiely, and Employer and Institute Advisory Board Member: Frank Torres* B. Interactive Process on Disability – Requesting Accommodations, What would you do, What's your Process? - *Lynn Clements, Leslie Silverman*
2:00-2:45	Important Judicial Decisions: Update on the Most Important Workplace-Related Judicial Decisions, including Rulings addressing LGBT, Harassment, ADEA, and More - *Kenneth Gage, Christopher Wilkinson*

2:45-3:30	Dr. Chris Haffer, EEOC - Data Collection Today, Tomorrow and Beyond
3:30-3:45	BREAK AND NETWORKING
3:45-4:15	Pros, Cons, and Risks of Artificial Intelligence in the Workplace - *Michelle Duncan, Eric Dunleavy*
4:15- 5:00	EEOC Update
5:00-6:30	POST-MEETING NETWORKING RECEPTION

May 2nd

8:00- 8:30	BREAKFAST & NETWORKING
8:30- 8:45	Recap of Day 1 and Introduction of OFCCP Director Leen - *David Fortney*
8:45-9:30	Updates from OFCCP Director Leen
9:30-9:45	Setting the Stage for Pay Day - *Mickey Silberman*
9:45-10:15	State Compensation Laws: Conducting Self-Audits and Analysis – *Kenneth Gage, Christopher Wilkinson*
10:15-10:30	BREAK AND NETWORKING
10:30-11:15	Updates on Directive 2018-05: Analysis of Contractor Compensation Practices During a Compliance Evaluation - *Lynn Clements, Mickey Silberman*
11:15-12:00	Conducting a Proactive Pay Analysis - *David Cohen, Kenneth Gage*
12:00-12:45	LUNCH
12:45-1:30	Analytics Panel - Pay Equity Analytics *Panelists: David Cohen and Bob LaJeunesse, Ph.D., Acting Director of Enforcement and Branch Chief of Expert Services Moderator: David Fortney*
1:30-2:00	Making and Messaging Pay Adjustments - *Valerie Hoffman, Christy Kiely*
2:30-3:00	Public Disclosures: Pressures from Shareholders, Activists, States, International Pressures, and More - *Michelle Duncan, Christopher Wilkinson*
3:00-3:10	Closing Comments and Safe Travels

The Institute for
WORKPLACE EQUALITY

2019
Annual Summit

Don't miss The Institute's 5th Annual Summit!

May 1-2, 2019
Falls Church, VA

The Institute for Workplace Equality, a major employer association, is holding its 5th Annual Summit during a time of major change for federal contractors. Timing to get your annual update couldn't be better! There is a lot happening at the OFCCP - CSALs coming out, Focused Reviews, and questions surrounding the EEO-1 pay report. The Annual Summit held on May 1-2, 2019 in Fall Church, Virginia is a "not to be missed" two-day meeting which will provide insight for participants on OFCCP Director Craig Leen's many directives. The meeting will also offer members and participants the opportunity to discuss the growing wave of state and international pay equity laws including the House Democrats new attempt to pass the Paycheck Fairness Act.

At the Annual Summit, The Institute's Co-Chairs will be joined by members of The Institute's nationally known faculty to give insight on the latest trends in OFCCP audits, what's next for EEOC, important litigation, as well as new federal regulations in the Trump Administration.

The Institute, led by its Co-Chairs—David Cohen, David Fortney and Mickey Silberman—has quickly become the "go to" place for federal contractors. Specifically, and immediately relevant to federal contractors is the work The Institute has done to provide input and recommendations to OFCCP on Agency initiatives and directives.. At the beginning of the Trump Administration, The Institute provided the new Administration with an OFCCP white paper with practical recommendations, many of which have been adopted by the agency under Director Leen. This level of involvement provides Institute Leadership and faculty with unique and valuable insights to pass on to members and conference attendees.

Joining the Institute Co-Chairs and Faculty will be OFCCP Director Leen, OFCCP Acting Director of Enforcement Robert (Bob) LaJeunesse and Dr. Chris Haffer, EEOC's first Chief Data Officer.

May 1, 2019

8:45 – 9:30 am
Washington's Insiders:
What's New with the OFCCP & EEOC


David Cohen
DCI Consulting Group


David Fortney
FortneyScott


Mickey Silberman
FortneyScott

The Co-Chairs will discuss the latest in what is happening at both OFCCP and EEOC including the next steps on EEO-1Component 2; Section 503 focused audits; and the issuance of CSALs. The Co-Chairs will also review the House Democrats' latest version of Paycheck Fairness and whether it is likely to pass.

9:30 – 10:15 am
OFCCP Audits are Coming,
Are you Prepared?


David Cohen
DCI Consulting Group


Michelle Duncan
Jackson Lewis

OFCCP plans to change its approach to audits through its use of Compliance Checks and Focused Reviews. Join two seasoned professionals to hear their insight into what these changes mean for employers and how to ensure your organization is prepared.

10:30 – 11:00 am
503 Focused Reviews are Here,
What do you Need to Know?


Lynn Clements
Berkshire Associates


Christy Kiely
Hunton Andrews Kurth

OFCCP will soon be conducting its first Section 503 focused reviews. Lynn and Christy will walk participants through what federal contractors can expect in these new audits and what they need to do prepared.

11:00 – 11:30 am
Preparing for OFCCP Compliance Checks


David Cohen
DCI Consulting Group


Mickey Silberman
FortneyScott

David Cohen and Mickey Silberman will remind participants what compliance checks involved and will discuss what contractors need to do to be prepared for the upcoming compliance checks.

11:30 – 12:00 pm
When Details of an Open OFCCP Audit Become Public


David Fortney
FortneyScott


Valerie Hoffman
Seyfarth Shaw

Recently, OFCCP has been openly discussing its findings in audits with the press and plaintiffs' counsel before telling the contractor. David Fortney and Valerie Hoffman will discuss how to prepare for public disclosure of audit results and how to respond to these public disclosures.

Breakout Sessions (Select One)

1:00 – 2:00 pm
Workday and other HRIS & ATS Systems


Valerie Hoffman
Seyfarth Shaw


Christy Kiely
Hunton Andrews Kurth


Frank Torres
M&T Bank

Many contractors are moving their HRIS systems to Workday. Workday and other HRIS systems do not collect data in away easily usable for AAP purposes. Val, Christy and Frank will discuss what they have learned and how best to use these systems to develop your AAPs.

1:00 – 2:00 pm
Interactive Process on Disability–Requesting Accommodations,
What would you do, What's your Process?


Lynn Clements
Berkshire Associates


Leslie Silverman
FortneyScott

It has been nearly 30 years since the passage of the ADA and the Rehab Act has been around far longer, yet most contractors still find compliance with aspects of these laws quite vexing. In this interactive session we will review examples and discuss how to analyze and address challenging workplace accommodation issues.

2:00 – 2:45 pm
Important Judicial Decisions: Update on the Most Important Workplace - Related Judicial Decisions, including Rulings addressing LGBT, Harassment, ADEA, and More

Kenneth Gage
Paul Hastings

Christopher Wilkinson
Orrick, Herrington & Sutcliffe

While many employers have been focused on the regulatory activities of OFCCP and EEOC, the courts have been actively legislating how the EEO laws are to interpreted. Ken and Chris will review court decisions on Title VII protections for LGBT employees; the reach of ADEA, the definition of what is sexual harassment and employers' obligations under ADA.

2:45 – 3:00 pm
Data Collection Today, Tomorrow and Beyond

Dr. Chris Haffer
EEOC

Acting EEOC Chair Victoria Lipnic took the extraordinary step of hiring Dr. Chris Haffer to be the EEOC's first Chief Data Officer. Dr. Haffer has already held stakeholders meetings, hired consultants to review the agency's data collection tools like EEO-1 Report and reorganized the department. Dr. Haffer will discuss where the agency is on upgrading its data capabilities and what is next.

3:45 – 4:15 pm
Pros, Cons, and Risks of Artificial Intelligence in the Workplace

Eric Dunleavy
DCI Consulting Group

Michelle Duncan
Jackson Lewis

Artificial intelligence tools that harvest data to make employment decisions have recently accelerated in use across the private sector. In this session, an expert Attorney and Industrial/Organizational Psychologist will review the current state of these tools, describe their potential value and EEO risk, outline approaches to validation, and provide attendees with an "ask your vendor first" checklist.

May 2, 2019

8:30 – 8:45 am
Recap of Day 1 and Introduction of OFCCP Director Leen

David Fortney
FortneyScott

David Fortney will kick off Day 2 of the 2019 Annual Summit by reviewing Day 1 of the Summit and introducing OFCCP Director Craig Leen.

8:45 – 9:30 am
Updates from OFCCP Director Leen

Craig Leen
OFCCP Director

OFCCP Director Craig Leen to join The Institute at the 2019 Annual Summit to provide updates directly from OFCCP.

9:30 – 9:45 am
Setting the Stage for Pay Day

Mickey Silberman
FortneyScott

Co-Chair Mickey Silberman will set the stage for "Pay Day" with updates on pay equity at both the federal and state level.

9:45 – 10:15 am
State Compensation Laws: Conducting Self-Audits and Analysis

Kenneth Gage
Paul Hastings

Christopher Wilkinson
Orrick, Herrington & Sutcliffe

The states are leading the way on cutting edge pay equity laws. Ken and Chris will review the current state laws and discuss how multi-state employers should conduct their pay analyses.

10:30 – 11:15 am
State Compensation Laws: Conducting Self-Audits and Analysis


Lynn Clements
Berkshire Associates


Mickey Silberman
FortneyScott

Since the new comp directive--2018-05--was issued by Director Leen, contractors have been trying to determine what it means for them. Mickey and Lynn will review the directive and how it has been clarified since it was issued in the summer of 2018.

11:15 – 12:00 pm
Conducting a Proactive Pay Analysis


David Cohen
DCI Consulting Group


Kenneth Gage
Paul Hastings

As contractors are urged by their lawyers to do proactive comp analyses, many contractors want to know what exactly does that look like. David Cohen and Ken will explain how to conduct a proactive pay analysis in light of the various state and federal pay equity laws.

12:45 – 1:30 pm
Analytics Panel - Pay Equity Analytics


David Cohen
DCI Consulting Group


Bob LaJeunesse, Ph.D.
OFCCP


David Fortney
FortneyScott

David Cohen and Dr. Bob LaJeunesse of OFCCP moderated by David Fortney will discuss OFCCP's new comp directive and what type of pay equity analytics the agency expects from federal contractors.

1:30 – 2:00 pm
Making and Messaging Pay Adjustments


Valerie Hoffman
Seyfarth Shaw


Christy Kiely
Hunton Andrews Kurth

The trickiest part of doing proactive pay analysis may be determining how to make any necessary pay adjustments to employees without creating more liability. Christy and Val will discuss the best practices in making and messaging these adjustments to employees, OFCCP, and plaintiffs' attorneys.

2:30 – 3:00 pm

Public Disclosures: Pressures from Shareholders, Activists, States, International Pressures, & More

Michelle Duncan
Jackson Lewis

Christopher Wilkinson
Orrick, Herrington & Sutcliffe

You've taken the first step of conducting pay analyses. Now, the pressure is on to release the results. Join Chris Wilkinson and Michelle Duncan in a timely discussion of the benefits and potential pitfalls of publicly disclosing pay analysis results.

3:00 – 3:10 pm

Closing Comments & Safe Travels

End of Conference

Registration Fee:

General Cost: $995 (early bird $895 until April 15th)
Member Cost: $795 (early bird $745 until April 15th)
For members who receive complimentary registrations with their membership level or for group registrations of 3 or more, please email contact@theinstitute4workplaceequality.org directly to register.

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- Faculty updates presented by leading expert practitioners in EEO field
- Membership includes representatives from compliance, staffing, compensation and legal
- Access to membership library that includes webinars, newsletters, reports, etc.

Visit our website to learn more about becoming a member!

MOHAMMAD PERVAIZ

From: Hartstein, Barry A. <BHartstein@littler.com>
Sent: Friday, April 05, 2019 8:56 AM
To: VICTORIA A. LIPNIC; SUSAN SNARE; DONALD MCINTOSH
Cc: Peters, Kristy L.; Petesch, Peter J.; Paretti, Jim; O'Neill, Kevin P.
Subject: FW: Executive Employer- Preparation Session- Available for Call on Thursday Afternoon (Per Below)

Video Session with Acting Chair Lipnic- We have an hour for the entire session (which will include comments by Littler attorneys). We recommend @3-5 minutes per response, depending on the nature of scope of the information deemed appropriate to share with attendees at the conference.

[Please let us know if there are any questions that you would like added and/or modified]

EEOC Session:
Barry Hartstein: Acting Chair Lipnic. Thank you being with us at the Executive Employer. While you cannot be with us in person today, we want to thank you for taking time out of your schedule in sharing information with us regarding EEOC developments
[*Brief comment by Acting Chair Lipnic, such as, "Thanks for inviting me. My regrets, but I had an unavoidable conflict that prevented being with you in person."]*

Internal Developments at EEOC
Question: Let me start out by asking you about internal developments at the EEOC. What information would you like to share with employers ?

Chair Lipnic Comments: [*Anything want to add on lack of quorum and impact on agency/New office & Chief Data Officer/the reduced inventory]*

Pay Equity and EEO-1 Reports
Question: Pay equity has become a very hot topic around the country, including the recent litigation impacting on EEO-1 Reports and required wage data to be submitted by employers. How is the EEOC approaching this issue?

Chair Lipnic Comments: [Can discuss issue from SEP perspective, plus EEO-1 update]

Harassment Prevention
Question: Both before issuance of the EEOC's Task Force Report and since that date, the issue of harassment prevention has been a key priority at the EEOC. You also have spoken to a countless number of employer groups since issuance of the Report. Based on your observations, what takeaways do you want to impress upon employers?

Chair Lipnic comments: [A lot to share, but the new issue you have raised is retaliation-do you want to incorporate that into this segment]

ADA
Question: In listening to you address employer groups in recent months, you consistently have brought up what you believe is an overlooked issue, which is the fact that the most number of EEOC lawsuits actually has involved ADA claims, rather than harassment, pay equity or some of the other form of discriminatory conduct. Why has so much attention been placed on this issue by the EEOC?

Chair Lipnic Comments:

Hiring Barriers

Question: In looking at EEOC developments, in reviewing both the prior and current Strategic Enforcement Plan, hiring barriers have remained front and center. As significantly, some of the agency's most significant settlements have involved failure to hire claims. From the EEOC's perspective, what would you like to share with the employer community, including any observations on the use of potential hiring tools, such as AI, in the hiring process?

Chair Lipnic Comments:

ADEA

In June 2018, as Acting Chair, you issued a report on the 50th anniversary of the ADEA on the State of Age Discrimination and Older Workers in the U.S. What do you consider to be the next generation of issues, both legal and practical, that should be of concern to the employer community?

Chair Lipnic Comments:

LGBT Coverage

Charges and litigation involving sexual orientation and gender identify continue to be pursued by the EEOC while coverage is debated in the courts. There also appears to be a split between the approach taken by the Justice Department and the EEOC. What guidance can you provide to employers on this topic

Chair Lipnic Comments:

Final Observations

What final comments would you like to share with the employer community about the EEOC and/or dealing with the EEOC?

[Chair Lipnic Comments: Conciliation project or anything else]

From: Hartstein, Barry A. f
Sent: Tuesday, April 02, 2019 10:26 AM
To: Hartstein, Barry A.
Subject: FW: Executive Employer- Preparation Session- Available for Call on Thursday Afternoon (Per Below)

Donald- their issues are fine and the order is fine.. the outline is good. Looked at Executive Employer. Roundtable- Equal Opp Project- like Issues and order is fine.

From: Hartstein, Barry A.
Sent: Thursday, March 21, 2019 2:30 PM
To: Hartstein, Barry A.
Subject: Executive Employer- Preparation Session- Available for Call on Thursday Afternoon (Per Below)

Loop in susan-
Dempster file…
In search of

Point I.-
April 10- early afternoon.
For any of these topics- pull some of the statistics_____
New office of data enterprise analytics- biggest operational change in 25 years- brought –chris haber and all of his good people able to hire in ways important and scary- but if believe in good gov't- sea of change
---

I. Clo – **Data analytics---check on availability-**

II. most important

I. Pay –April 10- 3 to 5

II. Harassment-

III. Hiring and Promotions and Recruiting- something in our congressional budget – chair message and appendix B- project underway- Equal Opp Project- and have to expand remedies we seek connecting emploeyrs to more recrurint and opp for people- damages. Some of it is more or less specific- This is more internal- connect ot Labor Dept and apprenticeship programs- and recruitment..

IV. Next Frontier – and employers and help workforces is on retaliation and what type of training to help employers

V. ADA- big story. Last year- 10 year ADA Amendments- success of Amendments Act. That is part of it! Litgation has shifted. Focus on reasonable accom. Trying to put together- look at the newer technologies to help people with disabiltiie- a lot done on tech side with autism. Beyond – move to the next level. Improved for deaft and hard of hearing.

ADEA- Look at employment 8 to 10 M out of work

LGBT- listed to possibly

Fort Bend- adm exhaustion-

Anotehr cong budget and chair's message and appendix b- Conciliation project- there is comprehensive review and how we can do them better.

Agency – in transition

Give run-down- statistics- lowest- backlog**-shutdown—Some impact..lost 6 weeks – Xmas and NY but lost Mo. of January. Believe backlog0 '19 – will be even lower..**

Legal cases- on items---particular =

From: Hartstein, Barry A.
Sent: Thursday, March 21, 2019 12:34 PM
To: Hartstein, Barry A.
Subject: FW: Executive Employer- Preparation Session- Available for Call on Thursday Afternoon (Per Below)

From: Hartstein, Barry A.
Sent: Sunday, March 17, 2019 10:16 AM
To: Petesch, Peter J.; Paretti, James; Peters, Kristy L.
Subject: Executive Employer- Preparation Session- Available for Call on Thursday Afternoon (Per Below)

All- As you will recall, I asked about a "repeat" (but modified) performance on EEOC developments for the Executive Employer.

Jim Paretti and I approached Acting Chair Lipnic to permit us to conduct a video interview that would be in the form of questions on key topics (similar to our agenda from our EEOC webinar), in which Littler speakers would address the topics from an employer perspective after her presentation. I would like to set up a call this week, and assuming you are

available, it may be helpful for you to join Jim and me in a call with the Chair's office for this Thursday at 2pm CT (i.e. 3pm ET/2pm MT/12 Noon PT).

Two key questions:

1. Can you join us for the call with the Chair? It may be helpful to get the input on areas of interest.
2. Our session is scheduled for late Thursday afternoon on the afternoon of the Executive Employer.

I have some specific recommendations on the "change up" for the Executive Employer, but I want to wait for the Chair's input.

Barry

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MOHAMMAD PERVAIZ

From: Kaylin, Anthony <akaylin@aseonline.org>
Sent: Tuesday, April 23, 2019 7:25 AM
To: CHRIS HAFFER
Subject: Interesting
Attachments: 2019.04.22 Motion for Leave to File Instanter a Summation of the 4.16.19 Hearing.pdf; 2019.04.22 Labor Council for Latin American Advancement & National Women's Law Center Notice of Post-Hearing Summation.pdf; 2019.04.22 Office of Management and Budget's Written Summation in Response to the Court's 4.16.2019 Order.pdf

It appears plaintiffs bought into the 2020 for 2019 data. Also, make EEOC produce EEO-1 filing instructions 5 weeks earlier than the July 1, 2019 date

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al.,*	)	
***Plaintiffs*,**	)	**Case No. 17-cv-2458 (TSC)**
v.	)	
OFFICE OF MANAGEMENT AND BUDGET, *et al.,*	)	
***Defendants*.**	)	

MOTION OF *AMICI* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CENTER FOR WORKPLACE COMPLIANCE, THE INSTITUTE FOR WORKPLACE EQUALITY, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER, INC. AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT FOR LEAVE TO FILE *INSTANTER* A SUMMATION OF THE APRIL 16, 2019 HEARING

The Chamber of Commerce of the United States of America (the "Chamber"), the HR Policy Association ("HRPA"), Associated Builders and Contractors ("ABC"), Associated General Contractors of America ("AGC"), the Center for Workplace Compliance ("CWC"), The Institute for Workplace Equality ("the Institute"), the National Association of Manufacturers ("The NAM"), National Federation of Independent Business ("NFIB"), National Retail Federation ("NRF"), the Restaurant Law Center ("RLC"), Retail Litigation Center, Inc., and the Society for Human Resource Management ("SHRM") (collectively referred to as "*Amici*")

respectfully move for leave to file a Summation of the April 16, 2019 hearing pursuant to Local Rule 7 (o) and the Court's Order dated April 11 and Minute Order dated April 16.[1]

On April 11, the Court granted Amici's request to file an amicus brief providing the Court with the perspective of the employer community regarding the specific challenges employers must address in order to comply with Component 2 of the Equal Employment Opportunity Commission's ("EEOC") revised Employer Information Form ("Revised EEO-1"). The Court later granted the parties leave to file summations of the April 16 hearing.

The court should also grant *amici* leave to file the short, attached submission because it addresses key points of unique import to *amici*. The testimony provided by EEOC's Chief Data Officer, Samuel C. Haffer, on April 16 raised new and heightened concerns regarding the timeline contemplated by the Court for employers to compile and submit Component 2 data. Specifically, Haffer's testimony made clear that: (1) the EEOC's proposed timeline fails to consider the impact on the employer community; (2) the EEOC's collection of sensitive and confidential information will not follow industry standards; (3) the employer community has not been provided with key information needed to conduct the collection and production of highly sensitive and confidential component 2 data, and indeed there is no timetable for providing that critical information; and (4) the EEOC confirmed that the highly sensitive and confidential data that is being demanded form employers has no utility and that the EEOC is not prepared to collect or analyze the data.

Therefore, *Amici* (who were not able to participate at the Hearing because Plaintiffs declined to assent to *Amici's* participation) request this opportunity to summarize testimony as it

[1] Counsel for *Amici* have conferred with Plaintiffs' counsel who stated they do not consent this filing because they believe the Court only wants hear from the parties. Defendants do not oppose this Motion.
oppose this Motion. Plaintiffs' did noAt the time of this filing *Amici* did not have a response from Plaintiffs to its request.

relates to the ability of employers to provide Component 2 2018 data to ensure the Court has this unique, important and otherwise unavailable perspective on this matter.

Dated: April 22, 2019

Respectfully submitted,

Seyfarth Shaw LLP

/s/ *Camille A. Olson*

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Center for Workplace Compliance
Institute for Workplace Equality
National Association of Manufacturers
National Federation of Independent Business
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al.,*	)	
***Plaintiffs*,**	)	**Case No. 17-cv-2458 (TSC)**
v.	)	
OFFICE OF MANAGEMENT AND BUDGET, *et al.,*	)	
Defendants.	)	

SUMMATION OF THE APRIL 16, 2019 HEARING BY AMICI THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, HR POLICY ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CENTER FOR WORKPLACE COMPLIANCE, INSTITUTE FOR WORKPLACE EQUALITY, THE NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER, INC. AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT

As previously noted in their Motion For Leave to File *Amicus Curiae* Brief, *Amici* represent hundreds of thousands of employers of all sizes across the country, most of whom are required to comply with EEO-1 reporting requirements.[1] The interests of *Amici* are direct, immediate, and different than the interests of the parties.[2] It is *Amici*'s members who will be

[1] The Chamber of Commerce of the United States of America (the "Chamber"), the HR Policy Association ("HRPA"), Associated Builders and Contractors ("ABC"), Associated General Contractors of America ("AGC"), the Center for Workplace Compliance ("CWC"), The Institute for Workplace Equality ("The Institute"), The National Association of Manufacturers ("The NAM"), National Federation of Independent Business ("NFIB"), National Retail Federation ("NRF"), Restaurant Law Center ("RLC"), Retail Litigation Center, Inc., and the Society for Human Resource Management ("SHRM") (collectively referred to as "*Amici*").

[2] *Amici* continue to believe that the Revised EEO-1 Report does not comply with the Paperwork Reduction Act ("PRA"), but limit this summation to the implementation issues this Court is now considering.

required to analyze demographic, payroll, and hours worked data and compute, compile, and submit the Component 2 data by location that was the subject of the April 16 Hearing.[3]

Amici provide the Court with a summation of four key issues of great practical importance to employers. The testimony provided by EEOC's Chief Data Officer, Dr. Samuel C. Haffer, made clear that: (1) the EEOC's proposed timeline fails to consider the impact on the employer community; (2) the EEOC's collection of sensitive and confidential information will not follow industry standards; (3) the employer community has not been provided with key information needed to come into compliance with the collection and production of highly sensitive and confidential component 2 data, and there is no timetable for providing such information; and (4) the EEOC confirmed that the highly sensitive and confidential data that is being demanded from employers has no utility and that the EEOC is not prepared to collect or analyze the data.

A. The EEOC's Proposed Timeline Fails to Consider the Impact On the Employer Community

The April 16 Hearing testimony made clear that the EEOC's proposed July 15 to September 30, 2019 collection period did not consider employers' ability to collect Component 2 data within that timeline. In response to direct questioning on the issue, the EEOC's Chief Data Officer, Samuel C. Haffer ("Haffer"), testified that NORC's estimated collection period of July 15 - September 30, 2019 "did not" include the "employer burden concerns" or the time it would take employers to comply with the Component 2 EEO-1 data collection requirements. Haffer at

[3] No party or counsel for a party authored this brief in whole or in part. No person other than *amici*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this filing.

p. 69, l.15-20.[4] Instead, Haffer testified that the September 30, 2019 date was picked because he understood it was the Paperwork Reduction Act expiration date for the EEO-1 form. Haffer Testimony P. 45, l. 8 - 17.

B. The EEOC's Collection of Sensitive and Confidential Information Will Not Follow Industry Standards

Haffer's testimony further made clear that under the compressed timeline proposed by the EEOC, Component 2 data would *not* be collected pursuant to applicable industry standards. Haffer at p. 30, l. 22 -31, l. 13; 45, l. 6-14; 46, l. 5-19. Haffer testified that to comply with acceptable industry standards for data collection, the timetable for collection by EEOC (with NORC's full participation) could not occur until 2021.[5] Haffer at p. 30, l. 22-31, l. 13; 45, l. 6-14; 46, l. 5-19. Haffer was not questioned as to what sacrifices in quality and confidentiality were made in the NORC proposal for Component 2 data collection by September 30, 2019 (a full 15 months before NORC's earlier quoted January 2021 timetable for data collection pursuant to industry standards). Haffer Testimony p. 45, l. 6 - 46, l. 19.

[4] Haffer's Declaration, which was accepted as direct testimony at the April 16, 2019 hearing, was not challenged or questioned insofar as Haffer testified he understood that employers believe that they are likely to experience significant issues regarding the immediate reporting of Component 2 data. See Dkt. 54-1, Haffer Decl. Par. 22 and fn. 5.

[5] We also learned for the first time at the hearing that in December 2018 the EEOC estimated it needed until January 2021 (24 months) to collect Component 2 data. Haffer Testimony P. 65, l. 16 - 66, l. 13. That estimate, which would "begin the data collection in January of 2021," aligns with NORC's 2021 estimate of the appropriate timetable to open the EEOC's portal for Component 2 collection purposes. Compare Haffer Testimony P. 65, l. 16 - 66, l. 13 with Haffer Testimony at p. 30, l. 22-31, l. 13; 45, l. 6-14; 46, l. 5-19.

C. The Employer Community Has Not Been Provided With Key Information Needed to Come Into Compliance with the Requirements for Collection and Production of Highly Sensitive and Confidential Component 2 Data; The EEOC Will Do So in the Future "On the Fly"

The EEOC cannot provide employers with necessary resources and information to enable them to begin preparations for compilation of Component 2 data at this time. According to Haffer, "given the limited time frame," the EEOC will have to address key resource materials like frequently asked questions "*on the fly*." Haffer Testimony p. 32 l 8-25.

As Haffer further testified, the EEOC does not have the resources to answer employer questions regarding Component 2 issues. As a result, the EEOC did not include information on its website about the Revised EEO-1 Component 2 filing. If it did, the EEOC would have been overrun by technical questions the EEOC was not prepared to answer. Haffer Testimony p. 29, ll. 15-17; p. 30, ll. 4-5; p. 32, ll. 23-25.

Haffer also testified that the resources the EEOC previously provided to the employer community in the 2016/2017 timeframe were preliminary "awareness building" resources, not informational resources designed to answer specific questions regarding the reporting of Component 2 data. According to Haffer, those resources are not sufficient to support employers' Component 2 filing questions. Haffer Testimony p. 32, l. 1-6.

As Haffer explained, there are many questions that must be answered by the EEOC before employers will be in a position to compile, analyze and submit Component 2 pay and hours data. Haffer Testimony p. 32, l. 1-6; 59, l. 8-18. Haffer provided specific examples of issues that employers would need resolved such as how to analyze and report on employee pay and hours data if the employee is coded as exempt and non-exempt within the same calendar year. Haffer Testimony p. 59, l. 8-18.

Nonetheless, EEOC has not offered any timeframes for when it will begin providing guidance, forms, or be open to provide answers to employers regarding Component 2. In this regard, Haffer testified that the EEOC had not even secured a contract with NORC to collect the EEO-1 Component 2 data -- which would be required before employers could begin receiving instructional information regarding the Revised EEO-1 data collection requirements from NORC. Haffer Testimony p. 4, l. 4-15.

Rather, the EEOC is in the process of exploring the regulations that would allow the EEOC to "sole source" this work to NORC without proceeding through the federal government's procurement competitive bid process. *See* Haffer Testimony p. 40, l. 4-20. If this work is awarded to NORC under the sole source procurement process, EEOC would then need to finalize the statement of work for NORC. Haffer Testimony p. 40, l. 10-20. Only then would EEOC be in a position to enter into a signed contract with NORC. Haffer Testimony p. 40, l. 10-16; p. 42, l. 15 - 25; p. 43, l. 2-14. In the meantime, as noted above, employers have not been given the critical information that is necessary to begin work necessary to collect Component 2 data for 2018.

D. The EEOC Confirmed that the Highly Sensitive and Confidential Data That Is Being Demanded From Employers Has No Utility and That the EEOC is Not Prepared To Collect Or Analyze the Data.

EEOC is not prepared to collect or analyze Component 2 data, which has little to no utility, according to Haffer. Haffer Testimony p. 73, l. 1-16. Haffer testified that the EEOC's IT systems and data analytics activities were outdated and antiquated, citing a publicly available OIG Report dated 9/5/2018 (available at *https://oig.eeoc.gov/reports/audit/2017-002-eoig*) that recently reached that conclusion. Haffer Testimony p. 73, l. 1-16. The OIG Report concludes that EEOC lacks an enterprise-scope analytics team to perform data analytics as well as key,

foundational components of infrastructure to support both reporting and data analytics initiatives. OIG Report dated 9/5/2018 (available at *https://oig.eeoc.gov/reports/audit/2017-002-eoig*).

Haffer further testified that the EEOC has concluded that the new Component 2 pay band data currently being collected in the EEO-4 context does not provide meaningful information and is being ignored by the EEOC (citing the National Academy of Sciences study). Haffer Testimony p. 46, l. 20 - p. 47, l. 8; p. 76, l. 2-18.

CONCLUSION

Based on the evidence presented to the Court on April 16, 2019 by the EEOC, *Amici* urge the Court to consider the impact to employers of collecting Component 2 data in the compressed timeframes that are contemplated by the EEOC's and Plaintiffs' submissions. The specific operational challenges, confidentiality issues, and lack of benefit to ordering a collection of Component 2 2018 data by September 30, 2019, should be taken into consideration by this Court.

Dated: April 22, 2019

Respectfully submitted,

Seyfarth Shaw LLP

/s/ *Camille A. Olson*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, ***et al.,***	)	
Plaintiffs,	)	**Case No. 17-cv-2458 (TSC)**
v.	)	
OFFICE OF MANAGEMENT AND BUDGET, ***et al.,***	)	
Defendants.	)	

[PROPOSED] ORDER

Upon consideration of the Motion for Leave to File a Summation of the April 16, 2019 hearing by *Amici* The Chamber of Commerce of the United States of America, the HR Policy Association, Associated Builders and Contractors, Associated General Contractors of America, the Center for Workplace Compliance, The Institute for Workplace Equality, the National Association of Manufacturers, National Federation of Independent Business, National Retail Federation, the Restaurant Law Center, Retail Litigation Center, Inc., and the Society for Human Resource Management, any opposition thereto, and the record herein, it hereby is ORDERED that the Motion be, and hereby is, granted in its entirety, and the Court will consider *Amici*'s Summation as part of the Record.

IT IS SO ORDERED

Dated:_____

_____
HON. TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al.*, *Plaintiffs*, vs. OFFICE OF MANAGEMENT AND BUDGET, *et al.*, *Defendants*.	Civil Action No. 17-2458 (TSC)

PLAINTIFFS' POST-HEARING SUMMATION

Pursuant to the Court's Minute Order of April 16, 2019, Plaintiffs hereby submit their written summation on the April 16, 2019 Hearing.

Plaintiffs' primary concern is that the EEO-1 pay data that would have been collected during the period of the unlawful stay actually be collected and that the collection be done in an orderly fashion that does not compromise quality—in other words, nothing more and nothing less than what would have occurred but for Defendants' unlawful actions. As Plaintiffs argued in their Response to Defendants' April 5, 2019 Submission, Dkt. No. 62 ("Response"), Defendants' plan for the data collection does not provide adequate assurances either that the missing data will be collected in full or that the collection will be orderly. Accordingly, Plaintiffs respectfully request that the Court issue the following ancillary declaratory and injunctive relief, consistent with its equitable authority to enforce its orders:

- Declare that the summary judgment opinion and order requires the collection of the missing two years of Component 2 pay data.

- Declare that the unlawful stay tolled the expiration of the three-year Paperwork Reduction Act ("PRA") approval.
- Order the EEOC to immediately take all steps necessary to complete the Component 2 data collections by September 30, 2019 (or to complete a substitute collection of calendar year 2019 data in the 2020 reporting period).
- Order the EEOC to provide notice to employers regarding the Component 2 data collections by April 26, 2019.
- Require the EEOC to provide biweekly compliance reports to Plaintiffs and the Court beginning on May 3, 2019.
- Require Defendants to exercise their emergency extension authorities if the Component 2 data collections are not complete by September 30, 2019.
- And retain jurisdiction over this matter for compliance purposes.

1. The Court's Authority to Order the Requested Relief Against Both Defendants.

As a preliminary matter, Defendants have suggested that the Court's authority either to order specific relief to ensure compliance with its summary judgment order in general or to compel compliance by the EEOC in particular is limited. Defs' Reply, Dkt. No. 63 ("Reply"), at 1-2; Apr. 16, 2019 Hr'g Tr., Dkt. No. 66 ("Hr'g Tr.") at 85-86. This suggestion is baseless.

As Plaintiffs noted in their Response and at the Hearing, the Court has inherent equitable authority to order ancillary relief to ensure that Defendants comply with the Court's Order. *See* Response at 13-14 (citing cases). Other Judges in this District recently have exercised this authority in APA cases after the vacatur of unlawful agency action. *See*, *e.g.*, Minute Order, *Nat'l Venture Cap. Ass'n v. Duke*, Civil No. 17-1912 (D.D.C. filed September 19, 2017) (Boasberg, J.), Minute Order, Dkt. No. 45 (granting Plaintiffs' motion for post-judgment

discovery in part) and Hearing Transcript, Dkt. No. 50, at 13-14 (the basis for permitting such discovery was to determine whether Defendants were delaying compliance with vacatur order and stating that the Court "has authority to make sure that my orders are being complied with"); *Mendoza v. Perez*, 72 F. Supp. 3d 168, 171 (D.D.C. 2014) (Howell, J.) (setting timeline for agency to conduct rulemaking to replace vacated guidance letters after the D.C. Circuit instructed the District Court to "craft a remedy to the APA violation" on remand). Thus, the type of ancillary relief requested by Plaintiffs is entirely within the Court's equitable authority to enforce its summary judgment order.

Nor does the EEOC Acting Chair's statutory administrative authority change this conclusion. Whatever discretion or administrative authority an agency has in the first instance, once the agency becomes subject to a Court order, as the EEOC is here, it does not have discretion not to comply with the conduct required by the order. While the EEOC asserted that the unlawful conduct at issue was primarily action taken by OMB, *see*, *e.g.*, Reply at 2, the EEOC is a party to the case; it was named in each of the Counts and the Prayer for Relief, Complaint, Dkt. No. 1 at 31-35; and the Court's summary judgment order vacated action by the EEOC, Mem. Op., Dkt. No. 45 at 41 (vacating the September 15, 2017 Federal Register Notice issued by the EEOC and reinstating the previously approved EEO-1 form). Put simply, as the Court noted at the Hearing, the EEOC cannot invoke its administrative authority as a basis not to comply fully or promptly with the Court's order. *See* Hr'g Tr. at 84 (stating that the EEOC cannot use its administrative authority to "delay the remedy" ordered).

This conclusion is buttressed by the fact that the EEOC's discretion as to the administration of the EEO-1 is limited by its own regulations, which require that employers file the operative version of the EEO-1 form annually. 29 C.F.R. § 1602.7. Per the Court's summary

judgment decision, the current EEO-1 form includes the Component 2 data collection. Neither the regulations nor the PRA itself provide discretion for the Commission to waive this requirement for a reporting year—as the Commission now proposes to do with 2017 calendar year pay data.

2. Collection of Two Years of Component 2 Data.

As Plaintiffs stated in their Response, Defendants have implicitly conceded that the vacatur of OMB's stay of the data collection requires the collection of two years' worth of pay data. Response at 13. In Defendants' own words, "[b]ut for OMB's decision to stay the collection of this data, employers would have gathered 2017 Component 2 data during a pay period of their choice between October 1, 2017, and December 31, 2017, and submitted that data to the EEOC on or before March 31, 2018." Defs.' Submission, Dkt. No. 54 ("Submission") at 2 (footnote omitted). Defendants did not did not deny, either in their Reply or at the Hearing, that the Court's order requires that this data be collected—yet they state that the Acting Chair has determined that the EEOC will forego the collection of calendar year 2017 data, purportedly based on her authority to administer the operations of the Commission. Reply at 2. As discussed above, the Acting Chair does not have administrative authority to ignore the requirements of this Court's summary judgment order. Accordingly, Plaintiffs request that the Court explicitly require the EEOC to collect a second calendar year of Component 2 data in addition to calendar year 2018 data.

The EEOC has objected to collecting Component 2 data for calendar year 2017 based on "concerns" that doing so "could decrease response rates and increase errors in the entire data collection process." Submission at 4. Plaintiffs have explained why these "concerns" are speculative and not substantiated. Response at 13. At the Hearing, when questioned by the Court about the stated concerns, the EEOC's Chief Data Officer, Dr. Samuel Haffer, speculated that

employers' databases might have changed in the intervening calendar year and that the EEOC has a better likelihood of receiving quality data by focusing employers' attention on one year of data. Hr'g Tr. at 53-54. Dr. Haffer's testimony did not provide specific reasons why collecting 2017 Component 2 data would not be feasible for the current collection period, nor has the EEOC established that it could not overcome its "concerns" through additional contracting support or by providing employers with brief additional time to comply. *See* Haffer Decl., Dkt. No. 54-1, ¶ 25 (cost of collecting Component 2 data for 2017 would increase EEOC's costs by only 25 percent).

In any event, Dr. Haffer's testimony only concerned the perceived ability to collect data pertaining to a particular year, not to the ability to collect two years of data as a general matter. To the latter point, Dr. Haffer testified that the EEOC would be able to collect Component 2 data for 2019 during the 2020 reporting period without any of the concerns he identified to collection of the 2017 data. Hr'g Tr. at 55. While the EEOC has not established that collecting calendar year 2017 data during the present reporting period is not feasible or that it is not required to do so, Plaintiffs would not object to the collection of 2019 calendar year data during next year's reporting instead, if it were established clearly by the Court that the EEOC is required to do so and that such collection complies with the PRA authorization.

As set forth more specifically below, Plaintiffs request that the Court issue a declaration that its summary judgment order requires collection of two years of Component 2 data, and provide a date certain in the immediate future for the EEOC to determine whether it will collect calendar year 2017 data or calendar year 2019 data, in addition to calendar year 2018 data. Doing so would provide certainty to the EEOC about its legal obligations and the terms of any contract to collect the data and to the reporting community.

3. Timing for Collection of Calendar Year 2018 Data.

Plaintiffs previously requested that the Court require the EEOC to develop a plan to open the Component 2 data collection in advance of the current May 31, 2019 deadline. Dkt. No. 62 at 2. Dr. Haffer testified at the Hearing that the contractor identified by the EEOC to perform the Component 2 pay data collection, NORC at the University of Chicago ("NORC"), informed him that it would refuse to conduct the data collection if it were scheduled to conclude any earlier than September 30, 2019. Hr'g Tr. at 46.

Plaintiffs cannot verify the accuracy or completeness of Dr. Haffer's representation as to the timeframe needed to conduct the Component 2 data collection, because they have not had the opportunity to depose Dr. Haffer or any NORC official, to seek written discovery of the EEOC or NORC, or otherwise to probe the factual basis for NORC's statement as relayed by Dr. Haffer. Nonetheless, Plaintiffs appreciate the Court's cautionary statement that any such discovery, even if granted, would necessarily further delay the matter. Hr'g Tr. at 78. Accordingly, Plaintiffs will assume the accuracy of Dr. Haffer's representations about NORC's view and the time needed to prepare for Component 2 collection, and therefore withdraw their request that the Court order the EEOC to conclude the Component 2 collection earlier than September 30, 2019.

Plaintiffs' decision not to contest Defendants' proposed timeframe, however, makes Plaintiffs' requests that additional assurances as to the completeness of the collection, discussed in more detail below, all the more pressing.

4. Post-September 30, 2019 Period.

The unlawful stay has tolled the expiration of the three-year authorization of the Component 2 data collection, which otherwise would be scheduled to occur on September 30, 2019. Defendants did not oppose Plaintiffs' position on this legal question in their Submission or

Reply, despite the Court's request at the March 19, 2019 hearing that they address the issue. Hr'g Tr. at 5-9. It is therefore appropriate for the Court to treat this issue as conceded. Hr'g Tr. at 8.

The determination that the unlawful stay tolled the three-year authorization period is also legally correct. First, it is consistent with the plain language of the PRA, which only prohibits the Director of OMB from "approv[ing] collections of information for a period in excess of three years." 44 U.S.C. § 3507(g). The statute plainly connects the three-year limitation to *OMB's actions*, not to an external constraint, a fact also reflected in the regulation authorizing stays, which provides that an agency's collection activities will cease "while the submission is pending" review by OMB. 5 C.F.R. § 1320.10(g). Here, OMB exercised its approval authority for the maximum three-year period and subsequently stayed its authority, necessarily staying the running of the three-year period. In contrast, where Congress intends to tie the expiration of a statutory deadline to a fixed, external constraint, it has clearly expressed that intention. *See*, *e.g.*, Federal Advisory Committee Act, 5 U.S.C. app. 1 § 14 (requiring that advisory committees "terminate not later than the expiration of the two-year period *beginning on the date of its establishment*") (emphasis added).

The determination that the unlawful stay tolled the expiration of OMB's authorization is also consistent with the purpose of the PRA. The PRA seeks to minimize the burden to the public of information collection while maximizing the utility of information collected by the government. 29 U.S.C. § 3501. Construing the approval to have paused when the stay was initiated and restarted when the stay was lifted would not increase the burden on filers beyond what was envisioned by the three-year approval and the PRA; the same amount of data would be collected the same number of times as OMB originally approved, and a new approval would be needed to collect data for additional reporting years.

Consistent with the PRA's purpose, OMB regularly reauthorizes information collections after expiration of the existing three-year authorization period, sometimes with changes proposed by the agency based on its experience collecting the information over the prior period. As the EEOC explained in its post-PRA approval supporting statement about the Component 2 data collection before the Court:

> The EEOC will begin collecting pay data as of March 31, 2018, and will be positioned to utilize pay data in its investigations in 2019, after the first pay data collection has been thoroughly reviewed for accuracy. As these investigations may still be ongoing at the time the next information collection request package must be submitted to OMB in late 2019, there will be limited information to evaluate for purposes of that PRA approval process. *Consistent with the PRA requirements and its commitment to assess this collection, however, the agency will consider whether changes may be warranted to increase the practical utility of the data collection or to decrease the burden on EEO-1 filers*. For example, the EEOC may consider the utility and burden of retaining the existing EEO-1 job categories or pay bands as compared to adopting new categories or bands.

Declaration of Benjamin Link, Dkt. No. 22-2 ("Link Decl."), Ex. I, Supporting Statement at 8 (emphasis added). Tolling the running of the authorization period during the unlawful stay would permit the EEOC to conduct and evaluate the information collection as it would in the normal course and then use that information to determine whether or how to propose to modify the collection in any future request to OMB for reauthorization. Both the EEOC and OMB would then have that information to determine how best to maximize the utility of the Component 2 collection and decrease the burden of its collection in future EEO-1 reports.

Because of the paucity of PRA cases and the lack of precedent for OMB's actions here, there is no legal authority of which Plaintiffs are aware that addresses specifically the effect of an OMB stay on the Section 3507(g) time period. That said, it is well established that Courts have authority to authorize a remedy that extends beyond a statutory lapse date. *See*, *e.g.*, *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated*, 492 U.S. 902 (1989), *aff'd on remand sub nom. Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989) (awarding IDEA plaintiff one and one-half

years of compensatory education, even though that would provide him with education past the statutory cutoff of age 21); *Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) ("This court has repeatedly 'reaffirmed the power of the courts to order that funds be held available beyond their statutory lapse date if equity so requires.'"); *Andrulis Res. Corp. v. U.S. Small Bus. Admin*., No. 90-2569, 1990 WL 169318, at *2 (D.D.C. Oct. 19, 1990) (extending expiration date by which Navy could enter into contract with plaintiff, due to SBA's unlawful activity impeding the contract; collecting cases); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted) ("[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.")

The conclusion is buttressed where, as here, the reasons for a post-September 30 collection result entirely from the agencies' actions, including the unlawful stay in the first instance, both agencies' total failure to engage in any "review" during the stay, the EEOC's failure to prepare a contingency plan for Component 2 data collection, and the incomplete information regarding timing for compliance provided during the litigation, Response at 3-4, Hr'g Tr. at 14. *See Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980) ("We see nothing sacred in the due date of the filing, especially when the work of the Census Bureau, at least as preliminarily demonstrated below, is incomplete. … It is the Bureau's own fault that the deadline is not being met."). The record is now clear that the agencies did not undertake any meaningful review of the Component 2 collection during the stay—OMB's purported reason for the stay in the first place—despite their representations to the Court that the existence of such a review should prevent judicial review. *See*, *e.g*., Dkt. No. 11-1 at 22 ("OMB's decision to review and stay Component 2 is … the first step in the agency's administrative reconsideration process, a

process that, if the Court permits it to continue, is designed to result in a final approval or disapproval decision by OMB."); Dkt. No. 27-1 at 18 (characterizing the stay as the "first step in OMB's multi-step reconsideration process… [which]includes consultation with the EEOC to address the concerns raised in the challenged August 2017 memorandum."). Contrary to these representations, as Plaintiffs previously noted, OMB's Director earlier testified that he did not give the pay data collection additional consideration following the stay. Dkt. No. 19 at 5. And Dr. Haffer testified that he was completely unaware of any internal "review" process. Hr'g Tr. at 64. The EEOC did not therefore appear to take any action in response to the Rao Memorandum's directive that it prepare a new information collection package for OMB to review. Rao Memo., Dtk. No. 11-2, at 2. In addition, as Plaintiffs pointed out in their Response and as Dr. Haffer's testimony confirmed, EEOC took no action to prepare to implement the Component 2 collection during the current EEO-1 reporting period in the event that the stay lifted or Plaintiffs succeeded in this litigation. Response at 5-6, Hr'g Tr. at 65-66.

It would be profoundly inequitable for Defendants to prevent the Component 2 data collection from ever occurring by implementing an unlawful stay that ran through the original authorization period (or for enough of the original authorization period that completing the data collection would be impossible before the authorization period expired). The Court has authority to prevent this outcome. *See Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated*, 492 U.S. 902 (1989), *aff'd on remand sub nom. Burr v. Sobol*, 888 F.2d 258 (2d Cir. 1989), 888 F.2d 258 (2d Cir. 1989) ("We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled

when he was younger.") (citing *School Comm. of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 374 (1985) ("equitable considerations are relevant in fashioning relief")). Allowing Defendants to forgo the collections or conduct collections of reduced quality due to the expiration of the original three-year authorization would create problematic incentives both in this case and in future cases. It could incentivize Defendants to slow-walk the collections this year, in the hopes that it would be delayed beyond September 30 and thus never occur. It would also incentivize those employers that have objected to the pay data collection to delay reporting in order to avoid having to comply at all. Hr'g Tr. at 69-71. And even more troublingly, it would give the OMB a roadmap to thwarting any collection that it disliked going forward: it could simply stay the collection and run out the clock until it was too late to restore it, knowing that its actions would be irremediable even if (as here) a court found them to be unlawful.

Thus, determining that the expiration date is tolled is the correct conclusion both legally and equitably. This determination would also provide certainty to both the EEOC and the reporting community that the missing Component 2 data collections will in fact occur, even if they are not complete by September 30, 2019. Accordingly, as set forth specifically, below, Plaintiffs request that the Court issue a declaration that expiration of the PRA authorization is tolled. In addition, however, Plaintiffs request that the Court order the agencies to exercise their emergency extension authorities, *see*, *e.g.*, 5 C.F.R. § 1320.13, to extend the current PRA authorization as necessary to complete the collection of two years of pay data. The emergency extension authority is a long-established and recognized power of OMB's, and its use would further protect Plaintiffs' remedy in the event of a post-September 30 data collection.

5. The Inadequacies of the EEOC's Plan Remain.

While Plaintiffs withdraw their challenge to the EEOC's September 30 deadline, it is still the case that the EEOC has not provided assurances that it will complete the Component 2 data

collection in a prompt and orderly manner. *See* Response at 11-12. Neither Dr. Haffer's testimony at the Hearing nor Defendants' counsel's representations have corrected this deficiency. To the contrary, the Court has rightly noted the concern that Defendants are "slow-rolling" implementation of the data collection, Hr'g Tr. at 83, and providing information to Plaintiffs and the Court in "dribs and drabs". Hr'g Tr. at 20. Those tactics, coupled with the serious deficiencies in EEOC's plan, require additional assurances that Defendants will fully comply with the Court's Order and specific ancillary relief to secure that compliance.

First, the EEOC has not finalized the contract with NORC to collect the Component 2 pay data and was not able to state definitively when it would do so or the cause of the delay. Hr'g. Tr. at 42-43; 82-83. Accordingly, Plaintiffs request an order requiring the EEOC to immediately take all steps necessary to complete the Component 2 data collection by September 30, 2019, along with regular intermediate reporting requirements to Plaintiffs and the Court.

Second, the EEOC has not provided a date certain by which it will notify EEO-1 reporters that they must report Component 2 data during the current EEO-1 reporting cycle and has failed to provide any persuasive rationale for why it has not already provided such notification. Hr'g Tr. at 66. Commission staff will not do so until the Acting Chair instructs them to "move forward" with the data collection. *Id*. This is the case even though employers have already relied on the delay in notification to resist compliance with the eventual data collection. Response at 11, n. 15. Nor does Dr. Haffer's testimony that such a notification would result in increased communications from the employer community justify the prolonged delay, Hr'g Tr. at 34-35—at a minimum, the EEOC could notify the employer community that it will establish a process to respond to employer questions as soon as it is able to do so. Finally, the EEOC has not issued, nor even apparently considered issuing, a Federal Register Notice to notify the regulated

community that the stay has been lifted. Hr'g Tr. at 52. Accordingly, Plaintiffs request a date certain by which the EEOC must issue such a notification statement on its website and submit the same for publication in the Federal Register. Plaintiffs propose April 26, 2019, for this deadline, which appears entirely feasible based on the testimony provided by Dr. Haffer and avoids further unnecessary delay.

Third, the EEOC has not adequately explained the decision to remove the prior Component 2 guidance from its website. Response at 4-5; *see also* Link Decl. ¶¶ 4-10 (describing information, including sample data file specifications, discovered by Plaintiffs on archived EEOC websites). While Dr. Haffer testified that his understanding was that the EEOC could not keep the website active as a result of the stay, Hr'g Tr. at 33-34, the regulations authorizing a stay do not state such a requirement. 5 C.F.R. § 1320.10(g). Rather it would be consistent with OMB's purported ongoing "review" for the EEOC to continue publishing its website information regarding the Component 2 data collection so long as the website also plainly stated that the EEOC was not presently conducting or sponsoring the collection of information. *Cf.* 5 C.F.R. §§ 1320.5(a), (b).

More importantly for present purposes, EEOC also has not justified its prolonged delay in restoring this information to its website now that the stay has been lifted, especially given that the information still accurately describes the data to be collected, as Dr. Haffer acknowledged, Hr'g Tr. at 58-59, and given his expressed concern that the employer community will have many questions about the pay data collection. While employers may have additional questions about special circumstances, *id.* at 59[1], the EEOC previously provided detailed definitions of the data

[1] Indeed, EEOC already has guidance on mid-year mergers and acquisitions, one of the scenarios identified by Dr. Haffer as possibly causing confusion, for the EEO-1 Component 1 data

to be collected, which remain valid and provide clear guidance for most situations. *See*, *e.g*, Link Decl. ¶ 6, Ex. C ("Instruction Booklet") at 4-5 and 5-11 (appendix with six pages of definitions, including "Description of Pay-Related Terminology").

Fourth, the EEOC appears to have abandoned the internal work it did to implement the Component 2 data collection in the period before the unlawful stay. Dr. Haffer testified that he does not know (and apparently has not reviewed) what internal work EEOC had done on employer guidance in the eleven months after OMB approval of Component 2 before the stay was entered in August 2017. Hr'g. Tr. at 60-61. Yet it is reasonable to expect that significant work of this sort was performed, because the EEOC was on track to implement the Component 2 collection on time, by January 2018, before it was stayed. *Id*. at 61. It is inexplicable that the agency would not revisit and review this work once the stay was lifted.

The third and fourth factors thus support Plaintiffs' requests for a date certain by which the EEOC must provide notice regarding Component 2 to employers; and that the EEOC be ordered to immediately take all steps necessary to complete the Component 2 data collection by September 30, 2019 along with regular intermediate reporting requirements.

Fifth, the EEOC does not have a plan for collecting Component 2 pay data after September 30, 2019. Response at 11-12. The agency has refused to state what it will do if there are any delays by either it or NORC in the proposed timeline. *See*, *e.g*., Hr'g Tr. at 80-82. While Defendants' counsel stated that "in the ordinary course" the EEOC and OMB would consult and agree to extend the PRA expiration, neither Defendant has provided a commitment that it would exercise its authority to do so in this case. Hr'g Tr. at 82. Even absent such delays, the EEOC has

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collection. *See*, *e.g.*, EEO-1 Survey User's Guide at 28-29, 79, 119-125, https://www.eeoc.gov/employers/eeo1survey/upload/2018-EEO1-Users-Guide-Version-1-2.pdf.

not provided a plan for how it would act affirmatively to secure compliance by employers that do not submit pay data by September 30. Rather, Dr. Haffer has stated that the EEOC could simply passively accept such data should employers choose to submit it, but the agency will take no steps after September 30, 2019 to solicit this data from employers who failed to provide it. Hr'g Tr. at 70-71.

Accordingly, Plaintiffs request that the Court declare that the expiration of the September 30, 2019 PRA authorization is tolled by the unlawful stay; that it order Defendants to use their emergency extension powers if the collections are not complete by September 30, 2019; and that it specify that the Component 2 data collections will not be deemed complete until the typical number of EEO-1 reporters submit the required Component 2 reports.[2]

Finally, Plaintiffs are concerned that several of the reasons identified by the EEOC for its delay in complying with the Court's Order are unrelated to the feasibility of prompt compliance. For example, the EEOC raised the issue of privacy and data security in its Submission and the Declaration from Dr. Haffer. *See*, *e.g.*, Haffer Decl. ¶ 21. As Plaintiffs explained in their Response, this issue does not provide a basis for delay. Response at 10; *see also* 30-Day Notice, 81 Fed. Reg. 45479, 45,491 ("The EEOC has successfully protected the confidentiality of EEO-1 data for over 50 years, since this data was first collected."), Link Decl., Ex. H, EEOC Supporting Statement, at 9-10. Dr. Haffer's testimony confirmed the point. *See* Hr'g Tr. at 50 (stating that his goal is to *exceed* federal standards, not questioning that the approved data collection would not meet current federal standards); 51-2 (confirming no known data breach of EEOC systems);

[2] Plaintiffs suggest that typicality be defined as the percentage of EEO-1 reporters who have submitted their required Component 2 reports equals or exceeds the mean percentage of EEO-1 reporters that actually submitted EEO-1 reports in each of the past four collection years.

52 (confirming that storage of aggregate pay data does not make EEOC's security measures less effective).[3]

Similarly irrelevant to whether the EEOC should move promptly with collection is Dr. Haffer's view of the utility of the Component 2 data collection, specifically the adequacy of the EEOC's prior pilot study and the decision to use pay bands. Both were thoroughly considered by the agency, the public, and OMB, during the initial PRA approval process. *See*, *e.g.*, 60-Day Notice, 81 Fed. Reg. 5113, 5114-15, & 5116-17, 30-Day Notice, 81 Fed. Reg. 45479, 45489.[4] Plaintiffs are concerned that the EEOC's untimely revisiting of these issues in this proceeding raises questions about its commitment to promptly and fully implementing the Component 2 data collection.

This final factor also supports Plaintiffs' requests for the various ancillary relief sought, including their requests that the Court declare that two years of data are required and that the expiration of the PRA authorization is tolled, and that the Court order the EEOC to take immediate action to complete the Component 2 collection, including providing employer notice by April 26, 2019, and intermediate reporting requirements.

6. Plaintiffs' Requested Ancillary Relief.

For the reasons set forth above, Plaintiffs respectfully request that the Court issue the attached proposed order which contains the following declarations and injunctive requirements:

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[3] The EEOC already has policies in place to prevent the only specific concern that Dr. Haffer identified—release of information that could be reverse-engineered to identify an individual person—by its policy of not releasing aggregate information derived from small sample sizes. *See* Response at 10, n. 14.

[4] Similarly, Dr. Haffer conflated the questions of whether the measure of pay to be reported (based on IRS W-2 box 1 information) meets the goals of the data collection with whether this measure of pay is clear to employers. Hr'g Tr. at 59. He agreed that the definition itself is clear. *Id*. Nevertheless, his conflation raises the concern that his apparent personal questions about the utility of the approved pay data collection are impacting his view as to whether and how promptly the EEOC should press forward to complete the Component 2 collection.

- The Court's summary judgment opinion and order requires that the EEOC collect Component 2 data for calendar years 2017 and 2018.

- In lieu of collection of Component 2 data for calendar year 2017, the EEOC may satisfy the Court's order requiring two years of data collection by collecting Component 2 data for 2019 during the 2020 EEO-1 reporting period. If the EEOC determines to exercise the option to collect Component 2 data for 2019 instead of 2017, it must so notify the Court and Plaintiffs of that decision by May 3, 2019.

- OMB's unlawful stay of its approval of the revised EEO-1 form tolled the three-year period of that approval for the duration of the stay, *i.e.*, one year and 188 days (553 days). Accordingly, barring further interruptions of the approval or extensions, the PRA approval for OMB Control No. 3046-0007 shall expire no later than April 5, 2021.

- The EEOC must immediately take all steps necessary to complete the Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019 (unless the EEOC exercises its option to collect Component 2 data for 2019 in lieu of 2017, in which case that collection may occur in the 2020 EEO-1 reporting period).

- By April 26, 2019, the EEOC must issue a statement on its website and submit the same for publication in the Federal Register notifying EEO-1 filers of the Court's March 4, 2019 order reinstating the Component 2 data collection and that they should prepare to submit Component 2 data no later than September 30, 2019.

- The EEOC must provide reports to Plaintiffs and the Court beginning on May 3, 2019, and continuing biweekly thereafter, providing notice of all steps taken to implement the Component 2 data collections since the prior report, notice of all steps to be taken during the

ensuing two week period, and indicating whether EEOC is on track to complete the collection by September 30, 2019.

- If the Component 2 data collections for calendar years 2017 and 2018 are not complete by September 30, 2019 or if the EEOC determines to collect calendar year 2019 data in lieu of calendar year 2017 data, Defendants must exercise all authorities to provide for emergency extensions of the September 29, 2016 PRA authorization for the collection (OMB Control Number 3046-0007) until the data collections are complete.

- The Component 2 data collections will not be deemed complete, for the purpose of the preceding paragraphs, until the percentage of EEO-1 reporters that have submitted their required Component 2 reports equals or exceeds the mean percentage of EEO-1 reporters that actually submitted EEO-1 reports in each of the past four reporting years. Until such time as the EEOC reaches completion by that metric, EEOC must exercise its authority to ensure compliance with the reporting requirement as it has in prior years, and Defendants must extend the approval period to the extent necessary and permissible under law to allow such steps.

- The Court will retain jurisdiction over this matter for the purposes of enforcing the March 4, 2019 summary judgment opinion and order as well as any additional orders regarding compliance.

Dated: April 22, 2019

Respectfully submitted,

/s/ *Robin F. Thurston*___

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WOMEN'S LAW CENTER, *et al*., *Plaintiffs*, vs. OFFICE OF MANAGEMENT AND BUDGET, *et al*., *Defendants*.	Civil Action No. 17-2458 (TSC)

[PROPOSED] ORDER

Based upon the parties' post-summary judgment filings, including Dkt. Nos. 47, 54, 62, 63, 65, the March 29, 2019 status conference, the April 16, 2019 hearing, the parties' post-hearing summations, and the entire record herein, the Court hereby issues the following declaratory and injunctive relief, which the Court concludes is necessary to ensure Defendants' compliance with its summary judgment opinion and order, Dkt. Nos. 45, 46. Accordingly, it is hereby

ORDERED and **DECLARED** that the Court's summary judgment opinion and order, Dkt. Nos. 45, 46, require that Defendant Equal Employment Opportunity Commission ("EEOC") collect EEO-1 Component 2 pay data for calendar years 2017 and 2018. It is

FURTHER ORDERED that in lieu of collection of Component 2 data for calendar year 2017, the EEOC may satisfy the Court's order requiring two years of data by collecting EEO-1 Component 2 data for 2019 during the 2020 EEO-1 reporting period. If the EEOC determines to exercise the option to collect EEO-1 Component 2 data for 2019 instead of 2017, it must so notify the Court and Plaintiffs of that decision by May 3, 2019. It is

FURTHER ORDERED that Defendant Office of Management and Budget's August 29, 2017 stay of its approval of the revised EEO-1 form tolled the three-year period of that approval for the duration of the stay, which lasted 553 days. Accordingly, the Court **DECLARES** that barring further interruptions of the approval or extensions, the Paperwork Reduction Act approval for the revised EEO-1 form including Component 2 pay data, OMB Control No. 3046-0007, shall expire no later than April 5, 2021. It is

FURTHER ORDERED that the EEOC must immediately take all steps necessary to complete the EEO-1 Component 2 data collection for calendar years 2017 and 2018 by September 30, 2019. If the EEOC exercises its option to collect EEO-1 Component 2 data for 2019 in lieu of 2017, that collection may occur in the 2020 EEO-1 reporting period. It is

FURTHER ORDERED that by April 26, 2019, the EEOC must issue a statement on its website and submit the same for publication in the Federal Register notifying EEO-1 filers that they should prepare to submit Component 2 data no later than September 30, 2019. It is

FURTHER ORDERED that beginning on May 3, 2019 and continuing biweekly thereafter, the EEOC must provide reports to Plaintiffs and the Court notice of all steps taken to implement the EEO-1 Component 2 data collections since the prior report, notice of all steps to be taken during the ensuing two week period, and indicating whether the EEOC is on track to complete the collection by September 30, 2019. It is

FURTHER ORDERED that if the EEO-1 Component 2 pay data collections for calendar years 2017 and 2018 are not complete by September 30, 2019 or if the EEOC determines to collect calendar year 2019 data in lieu of calendar year 2017 data, Defendants must exercise all authorities to provide for emergency extensions of these data collections until the data collections are complete. It is

FURTHER ORDERED that the EEO-1 Component 2 data collections will not be deemed complete, for the purpose of this Order, until the percentage of EEO-1 reporters that have submitted their required EEO-1 Component 2 reports equals or exceeds the mean percentage of EEO-1 reporters that actually submitted EEO-1 reports in each of the past four reporting years. Until such time as the EEOC reaches completion by that metric, the EEOC must exercise its authority to ensure compliance with the reporting requirement as it has in prior years, and Defendants must extend the approval period to the extent necessary and permissible under law to allow such steps; and it is

FURTHER ORDERED that the Court will retain jurisdiction over this matter for the purposes of enforcing the March 4, 2019 summary judgment opinion and order as well as this order.

SO ORDERED

DATE:

TANYA S. CHUTKAN
United States District Judge